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Supreme Court, U.S.
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In The
Supreme Court of the United States

RONALD JOHNSON,

Petitioner,

vs.

CITY OF SHOREWOOD; CITY OF MINNETONKA; RILEY-PURGATORY-BLUFF CREEK WATERSHED DISTRICT; TRIVESCO, a partnership; and its Partners; ROBERT H. MASON, INC., a corporation; HIGHLAND PROPERTIES, INC., a corporation; STEINER AND KOPPELMAN, INC., a corporation; and HIGHLAND VILLA BUILDERS, INC., a corporation,

Respondents.

On Petition For A Writ Of Certiorari To The Minnesota Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under the Supreme Court's precedential rulings of *SanRemo Hotel, LP v. City and County of San Francisco, Cal.*, 545 U.S. 323, 325 (2005) and *Williamson County Reg'l Planning Comm. v. Hamilton Bank*, 473 U.S. 172 (1985), a farmland owner simultaneously sought claims in state court for just compensation under state law and, in the alternative, the denial of such compensation as violative of the Federal Constitution's Fifth Amendment for unlawful governmental takings. The lower court's judgment against the farmland owner rested solely on state law – ignoring the farmland owner's federal Just Compensation Clause claims and rights.

1. After *SanRemo Hotel,* can a state court preclude adjudication of a post-judgment as-applied Just Compensation Clause § 1983 claim, based in part on extrinsic fraud and in part on insufficient constitutionally-guaranteed just compensation, as an impermissible collateral attack on the prior state court judgment?

2. Under *Williamson* and *SanRemo Hotel*, does an as-applied Just Compensation Clause § 1983 claim accrue, if ever, when (i) the original taking occurs; (ii) upon entry of the state court condemnation final judgment awarding less compensation than the Just Compensation Clause

QUESTIONS PRESENTED – Continued

requires; or (iii) after state court denial of state post-judgment proceedings and remedies?

3. The Court of Appeals found constitutional takings of property for public use not judicially for compensation under the Federal Constitution if the government takings – as a matter of degree – is temporary. May a state court preclude Just Compensation Clause claims for temporary physical takings based on the availability of state law torts against the government such as nuisance or trespass?

LIST OF PARTIES

The caption of the instant case lists all parties to the proceeding.

CORPORATE DISCLOSURE STATEMENT

The Petitioner, Ronald Johnson, is not and does not represent a nongovernmental corporation. Only Ronald Johnson – acting pro se – filed a state notice of appeal without the signature of his wife Dee Johnson, therefore, she did not perfect an appeal. Mr. Johnson, because he is not an attorney, could not file an appeal on behalf of another family member.*

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* *In re Conservatorship of Riebel*, 625 N.W.2d 480, 481 (Minn. 2001).

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OPINION BELOW

The Minnesota Court of Appeals unpublished decision of February 19, 2008. *Johnson v. City of Shorewood,* 2008 Minn. App., 2008 WL 434680 (Feb. 19, 2008). The Minnesota Supreme Court denied review without an opinion on April 29, 2008. App. 74-75.

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U. S. Const. amend. V:

No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

42 U.S.C. § 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be

liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

STATEMENT OF THE CASE

Introduction

The City of Shorewood built a culvert/dam that flooded a decades-long dry ditched-and-drained land mass – used as farmland. Compensated for the initial flood damage – $63,000 – but receiving zero compensation for *that* taking, the private property owner later discovered that more adversity would come by the hands of the government. Ronald Johnson, the property owner, later discovered that Shorewood: (i) would take no action to mitigate future major flooding events; (ii) would allow the dam to continue to fill with silt the once self-scouring, free-flowing ditch; (iii) would perpetually and permanently create flooding conditions crippling any conversion of the farmland into marketable developable property; and finally, (iv) would allow diversion of surface water run-off onto Johnson's property that in concert with the culvert/dam, compounded and provided conditions to induce flooding even during minor rain events.

Efforts to litigate based on these subsequent discoveries for just compensation for Johnson's described permanent governmental takings have proven futile. Although Johnson pled in post-judgment state court proceedings state law takings claims and, in the

alternative, the denial of compensation as violative of the Federal Constitution's Fifth Amendment – as the Supreme Court contemplated in *Williamson* and its successor *SanRemo Hotel* – the state court *precluded adjudication* of the federal claims under the doctrines of res judicata and collateral estoppel from the state court judgment being challenged. The post-judgment, as-applied Just Compensation Clause § 1983 claim – essentially a collateral attack[1] based in part on extrinsic fraud[2] and in part on insufficient constitutionally-guaranteed compensation – sought relief based on federal law against the state court's final judgment and state procedures regarding the subsequently-discovered governmental takings. As the U.S. Court of Appeals for the Eighth Circuit stated after directing parties to take the matter back to state court:

> [I]f the state courts deny relief, the Johnsons may seek review by the United States Supreme Court.[3]

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[1] *See, generally,* 21A Fed. Proc. L. Ed. § 51:221 (collateral attack on judgments); Restatement (Second) of Judgments § 12 (1982) (contesting subject matter jurisdiction in subsequent proceeding).

[2] *See, e.g., Hospital Underwriting Group, Inc. v. Summit Health Ltd.,* 63 F.3d 486 (6th Cir. 1995); *Sonya C. By and Through Olivas v. Arizona School for the Deaf and Blind,* 743 F. Supp. 700 (D. Ariz. 1990).

[3] *Johnson v. City of Shorewood,* 360 F.3d 810, 818-19, *cert. denied,* 543 U.S. 810 (2004).

1. Johnson's Litigation Against Shorewood

Johnson initially prevailed in an inverse condemnation proceeding against Shorewood regarding the government's construction of a culvert/dam.[4] The condemnation proceeding sought after a major flooding event resulted in Shorewood's payment of $63,000 for single flood event "clean-up costs" and "zero" compensation for the taking. App. 133-34. Although commenced in 1994, the lower court finally entered final judgment in January 2000. App. 124.

At the time, Johnson did not appeal from the $63,000 clean-up costs/zero condemnation award in the initial proceedings because on its face the final award dealt with a one-time flooding event. The zero compensation – on its face – did not cover subsequent flooding events. Furthermore, Shorewood had promised to negate subsequent flooding events through mitigation projects.

But, after entry of the 2000 final judgment, Johnson discovered:

(i) Shorewood did not intend to negate subsequent flooding events through mitigation projects;

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[4] The lower courts have described the construction as a "control structure" or "a road berm, culvert, and a pond control structure . . . " that " . . . blocks a ditch that drains abutting property owned by [Ronald Johnson]. . . . " *See e.g., City of Shorewood v. Johnson*, 1998 Minn. App., 1998 WL 188561 (Apr. 21, 1998) and *Johnson v. Shorewood*, 2008 Minn. App., 2008 WL 434680 (Feb. 19, 2008).

(ii) Subsequent governmental flooding as a result of the culvert/dam did occur;

(iii) Shorewood allowed additional diversions of surface-water discharges to enter his property through the drainage ditch to the government's dammed ditch holding pond;

(iv) The culvert/dam and holding pond created conditions to allow silt to fill the ditch and perpetually diminish the effectiveness of the decades-old (circa 1950s) self-scouring, free-flowing ditch to discharge water;

(v) The additional surface-water diversions and silt filling of the drainage ditch worked in concert to perpetually cause continual flooding onto decades-old dry farmland even during minor rain events;

(vi) The continual governmental induced flooding affected the market value of the decades-old dry land mass as developmental property; and

(vii) Contrary to Shorewood's representations, the U.S. Corps of Engineers did not determine the known decades-old ditched dry land mass as a designated pre-taking (pre-culvert/dam) Clean Water Act wetland under 33 U.S.C. § 1344.

As a result of these findings, Johnson commenced another state court action. Believing he had exhausted

state court proceedings, Johnson utilizing the Supreme Court precedent in *Williamson* brought a post-judgment, as-applied Just Compensation Clause § 1983 claim against Shorewood in U.S. District Court. ("The nature of the [Just Compensation Clause] constitutional right . . . requires that a property owner utilize [state court] procedures for obtaining compensation before bringing a § 1983 action.") *Williamson County Reg'l Planning Comm. v. Hamilton Bank*, 473 U.S. 172, 194 n. 13 (1985).

Although affirming the U.S. District Court's decision to dismiss *without prejudice*, the U.S. Court of Appeals for the Eighth Circuit in 2004 recognized Johnson's post-judgment as-applied Just Compensation Clause § 1983 claim. The Eighth Circuit held, however, that Johnson must exclusively use state court procedures to simultaneously seek any available post-judgment state compensation remedies and, if denied those, any as-applied Just Compensation Clause § 1983 remedies:

> For the 42 U.S.C. § 1983 claims against Shorewood, Minnetonka, and the Watershed District, we agree that "the record does not show the existence of any potential constitutional violation . . . other than the alleged taking of the Johnsons' property without just compensation."
>
> Johnsons argue that they were denied just compensation due to "misrepresentations" perpetrated in the state court proceedings-misrepresentations which they allegedly

> discovered after the fact. Whatever the validity of these allegations, *Rooker-Feldman* stands as a bar to federal review because the Johnsons' requested relief "would effectively reverse the state court decision or void its ruling."
>
> The Johnsons' remedy, if any, is to return to state court and utilize its procedures for remedying fraud. If the state courts deny relief, the Johnsons may seek review by the United States Supreme Court.

Johnson, 360 F.3d at 818-19 (citations omitted).

Following the directions of the Eighth Circuit, Johnson then sought in state court post-judgment declaratory and compensatory remedies available under state law while *simultaneously* seeking available federal remedies using the precedential ruling of *Williamson* as a foundation for his post-judgment, as-applied Just Compensation Clause § 1983 claims against Shorewood.

Ultimately, Minnesota state district court dismissed Johnson's claims. The court precluded adjudication of Johnson's as-applied federal Just Compensation Clause § 1983 claim based on the 2000 state judgment Johnson challenged. The Minnesota Court of Appeals agreed. In affirming the dismissal of Johnson's claim and denial of summary judgment, the Minnesota Court of Appeals *simultaneously* held that the 2000 state court condemnation final judgment, under the doctrines of res judicata and collateral

estoppel, precluded Johnson's *Williamson* as-applied Just Compensation Clause § 1983 claim *and* held under Minnesota state law no post-judgment declaratory or compensatory procedures were available to address Johnson's post-judgment, non-compensated governmental flooding events.

In so doing, the Minnesota Court of Appeals ignores the mandate of *SanRemo Hotel, Williamson*'s successor, that required the Minnesota Court of Appeals to hear "simultaneously [Johnson's] request for compensation under state law and [Johnson's] claim that, in the alternative, the denial of compensation would violate the Fifth Amendment of the Federal Constitution." *SanRemo Hotel,* 545 U.S. at 325 (2005), *citing Williamson*, 473 U.S. 172 (1985).

2. Evidence of Continual Governmental Flooding of Private Property After the 2000 State Court Judgment Remained Unchallenged.

It is undisputed that Shorewood's flooding on Johnson's private property, caused by Shorewood's culvert/dam in Johnson's drainage ditch, continued after the 2000 state court's final judgment. Shorewood did not carry out any of the flooding mitigation projects discussed with Johnson in 1997 and 1998. As an unchallenged expert opinion found in 2006, Johnson's property did and continues to suffer from governmental flooding:

> On December 8, 2005 MFRA completed a site visit to observe the current condition of the

> "tractor" culvert [on Johnsons' property] and associated drainage ditch . . .
>
> As MFRA predicted in 1995, sediment deposition has caused the culvert to be almost entirely submerged and the ditch function seriously further impaired. As MFRA also noted in 1995, prior to the ditch alterations the ditch had sufficient gradient to largely self-scour to free itself of sediment. The alteration of the ditch on City property (Waterford Outlot A) was intended to permanently impound water at elevation 910 feet MSL providing zero upstream ditch gradient to the culvert. This along with frequent flood events and off-site public storm water discharges to the site has caused water to frequently pond at the 914-foot or higher elevation and subsequently caused sediments to deposit within the portion of the drainage ditch on Johnsons' property which is basically an extension of the Waterford Outlot A pond.

App. 101-02. This expert opinion and prior referenced expert opinions remained unchallenged throughout the state court post-2000 proceedings.

3. The Lower State Court's 2000 Final Judgment Award of Damages Did Not Include Payment for Post-Judgment Flooding Events.

There is nothing in the state court's 2000 final judgment that included a compensation award for continual governmental flooding. In fact, the lower court accurately described the award as money

exclusively for clean-up costs of the initial, single flooding event: "[The $63,000 of] clean-up costs appear to be based on clearing dead trees from the drainage ditch. Appellant testified that the flooding caused by Shorewood killed a number of mature trees and that his time cleaning up the property (3,400 hours) should be compensated at an appropriate hourly rate ($20)."[5] Factually unchallenged – Shorewood has paid to date "zero" for governmental flooding of Johnson's farmland after 2000.

4. Shorewood Misrepresented in State Court That the Corps of Engineers had Designated a Clean Water Act Wetland on Johnson's Property Prior to Shorewood Installing the Culvert/Dam.

After the 2000 final judgment, Johnson discovered Shorewood had fraudulently or mistakenly misrepresented in the 1996 state jury trial that the Corps of Engineers had determined a pre-taking, pre-1984 Clean Water Act wetland on his property under the federal Clean Water Act, 33 U.S.C. § 1344. Shorewood used the misrepresentation to reduce Johnson's compensation by reducing the pre-taking value of the property. Based on misrepresenting the Corps' findings of pre-taking Clean Water Act wetlands, Shorewood also erroneously claimed that Johnson's

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[5] Johnson also received interest and some attorney's fees and costs per the 2000 final judgment.

property had city-designated wetlands prior to the installation of the culvert/dam.[6] The irony, of course is here, a Clean Water Act wetland or city-designated wetland could not have existed prior to the installation of the culvert/dam in 1985 because Johnson's property unequivocally had been ditched-and-drained "dry" since the 1950's.

During the current litigation, Johnson presented irrefutable evidence that the U.S. Corps of Engineers had not determined a pre-taking, pre-1984 Clean Water Act wetland. Furthermore, evidence also included that the Corps does not do historical delineations of pre-taking wetlands under the Clean Water Act.

The Corps later confirmed the evidence. Contrary to Shorewood's representations, the Corps did not determine a pre-taking, pre-1984 Clean Water Act wetland: "[o]ver the last 14 years, we have explained many times that you may need a permit to discharge dredged or fill materials in parts of your property that are wetland, *but that most of your property may be nonwetland.*" (emphasis added) App. 98. *See also*

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[6] Recently, the U.S. District Court for the Northern District of California faced similar municipal arguments stating, "[the City's] conduct is noteworthy because it calls into question the trustworthiness of the opinions and conclusions presented by the City at trial regarding the location and cause of wetlands on Beachwood. Having exhibited a pattern of shifting consultants and shifting definitions, the City comes to trial with impaired credibility on the key wetlands issues in the case." *Yamagiwa v. City of Half Moon Bay,* 523 F.Supp.2d 1036, 1063 (N.D. Cal. 2007).

86. Thus, the Corps never declared Johnson's property as wetland. "You have *never been told either there was or was not* '33 U.S.C. § 1344, Section 404 federal jurisdiction wetland *prior to* construction of the 'road/dam.'" (emphasis added) App. 95. *See also* 86.

Nonetheless, despite the evidence of extrinsic fraud present in this case, during the most recent appellate process, the Minnesota Court of Appeals refused to recognize Johnson's arguments for judicial notice of the federal agency's public documentation disclosed only during the appellate process – i.e., the Corps letters dated February 8, 2007 and March 8, 2007 – further demonstrating the extrinsic fraud. App. 43-46; 76-104.

The Corps' evidence sought to be brought before the court, contradicted Shorewood's governmental expert Ronald P. Peterson's testimony during the original condemnation proceeding in 1996 (resulting in the $63,000 award of damages for the single-flooding-event clean up costs, but zero compensation for the taking):

> Q. OK. Now, as I understand your testimony, you think that – you will agree that if the Johnson property was not – was not a wetland before the taking and is now a wetland, you would agree that the Johnsons have sustained damage, would you not?
>
> A. Yes.

Q. OK. We'll write damage (indicating) pre-taking, wetland – Oh, no. Wetland and after wetland. Under those circumstances, you would agree that Mr. Johnson – that the Johnsons have sustained damage. Correct?

A. Correct.

* * *

Q. You're aware that the Corps of Engineers has not asserted jurisdiction over this property, are you not?

A. They most certainly have.

* * *

Q. And what language in those letters specifically leads you to believe that the Corps believed that Johnsons' property was a wetland.

A. Well, there are three letters. One is February 7, 1994, one is from March 2nd, 1993, one is from March 17th, 1993.

* * *

Q. Is it your testimony that all of this area was and is wetland?

A. Yes.

City of Shorewood v. Johnson, Case No. CD-2344, Trial Transcript 10-22-96. App. 140-41; 145-46; 151.

Thus, Shorewood's expert's testimony *contradicts* what the Corps has said in its own post-2000 final

judgment letters – including letters the lower court chose to ignore. Johnson discovered the discrepancy between Shorewood's expert's testimony and the Corps true position after the 2000 final judgment. Johnson's subsequent proceedings, as embodied in his § 1983 claims, pursued allegations of the lack of "full and fair opportunity to be heard." The Minnesota Court of Appeals, by not reaching the federal claims based on res judicata and collateral estoppel doctrine, precluded adjudication of these additional federal claims and related remedies.

5. Johnson Received no Compensation for a Temporary Governmental Taking.

The Minnesota Court of Appeals denied Johnson any compensation for a temporary physical taking because under Minnesota state law compensation is only available for permanent, not temporary, physical takings:

> If the government's use of the subject property was temporary, the landowner does not have a valid claim for a taking, but may have a claim in tort for nuisance or trespass.

App. 36.

After the 2000 judgment, in early June of 2000, Shorewood moved construction equipment onto Johnson's property to construct a walking trail along Vine Hill Road. In the preparation of the site, workers marked the construction site and placed a silt fence back in the woods on Johnson's private property as

well as construction equipment. No prior notice of the occupation had been provided to Johnson. When Johnson discovered the occupation, he objected to governmental authorities who eventually removed the equipment and silt fencing – resulting in a governmental occupation of his private property of about one week.

Johnson sought state law and § 1983 claims for the temporary taking damages under the Just Compensation Clause. The state trial court denied his demand, later affirmed by the Minnesota Court of Appeals, on the ground that governmental takings of private property are a matter of degree. Thus, the state court found the governmental occupation of one week to be a possible common law claim of trespass or nuisance, but not a "taking" worthy of compensation under the Just Compensation Clause.

The federal question, once again, remained unadjudicated.

ARGUMENTS FOR ALLOWANCE OF THE WRIT

Despite the Supreme Court and the U.S. Court of Appeals for the Eighth Circuit precedents regarding simultaneous litigation of state and federal taking claims in state court, the lower court's judgment precludes federal remedies for alleged governmental misconduct and state procedural and judgment inadequacies. The ultimate result to date is unrestrained state governmental power to perpetually

burden private property to the detriment of the private property owner, with zero compensation for significant property losses, and with no regard to individual federal rights and remedies.

This case, while unique factually, presents numerous legal issues left open by *SanRemo Hotel,* which remain unresolved resulting in the nation-wide unequal treatment of as-applied Just Compensation Clause § 1983 claims.

Furthermore, Minnesota courts seek to limit defined constitutional rights and Supreme Court doctrine regarding the Fifth Amendment's Just Compensation Clause through the common law of torts. The slippery slope of using state torts as legally-satisfactory substitutes for federal constitutional Just Compensation Clause claims – depending on the "degree" of the physical taking – has led Minnesota to deprive citizens of constitutionally-guaranteed just compensation for temporary physical takings.

I. *SanRemo Hotel* "conspicuously leaves open" Numerous Legal Issues Relating to *Williamson* As-Applied Just Compensation Clause § 1983 Claims Causing Unequal Legal Treatment of These Claims Nationwide.

SanRemo Hotel's opinion and concurrence reflects a concern of how state courts should adjudicate *Williamson* as-applied Just Compensation Clause § 1983 Claims. The instant Petition raises the very issues that *SanRemo Hotel,* as the concurring

Justices put it, "conspicuously left open." *Id.* at 351 n. 2. *SanRemo Hotel* apparently arose from this Court's vigilant concern of ensuring state courts, post-*SanRemo Hotel,* provide equal protection under the Just Compensation Clause and § 1983 as it relates to state court adjudication of *Williamson* as-applied Just Compensation Clause § 1983 claims. But, courts have not applied the *SanRemo Hotel* principles consistently. In fact, seemingly ignoring *SanRemo Hotel* doctrine, state courts, based on res judicata and collateral estoppel, are precluding adjudication of § 1983 claims challenging the adequacy of the prior state court judgment and proceeding.

A. State Courts Must Consider and Adjudicate, After Denying Any Compensation Under State Law, Asserted Federal Claims That Denial of Compensation Under State Law Results in a Valid *Williamson* As-Applied Just Compensation Clause § 1983 Claim.

This Court should re-formulate its *SanRemo Hotel* mandate to ensure state courts consider and adjudicate, after denying any compensation under state law, asserted federal claims of whether that denial of compensation results in a valid *Williamson* as-applied Just Compensation Clause § 1983 claim. The Minnesota Court of Appeals did not do so – as feared by the Justices joining the concurring opinion in *SanRemo Hotel*. *Id.* at 351 n. 2. The *SanRemo Hotel* opinion clearly mandates that the state court

shall hear "simultaneously [Johnson's] request for compensation under state law and [Johnson's] claim that, in the alternative, the denial of compensation would violate the Fifth Amendment of the Federal Constitution." *Id.* at 325. Yet, even so, the concurring opinion in *SanRemo Hotel* was concerned about problems that would arise from state court adjudication of *Williamson* as-applied Just Compensation Clause § 1983 Claim accruing upon entry of state court condemnation final judgments. *Id.* at 351 n. 2.

The concurring opinion cited two state court opinions which had already applied before the *SanRemo Hotel* decision the "state court litigation" requirement on *Williamson* as-applied Just Compensation Clause § 1983 Claim brought in state court which, for all intents and purposes, denies plaintiffs an opportunity for their "*Williamson* as-applied Just Compensation Clause § 1983 claims" to be heard in state court. *Id.* at 351 n. 2. *citing Breneric Assoc. v. City of Del Mar,* 69 Cal.App.4th 166, 188-89, 81 Cal.Rptr.2d 324, 338-39 (1998) ("A plaintiff's action for damages under section 1983 based on a regulatory taking is premature until the plaintiff has . . . exhausted his state-provided remedies for receiving just compensation for the alleged taking") and *Melillo v. City of New Haven,* 249 Conn. 138, 154, n. 28, 732 A.2d 133, 143, n. 28 (1999) ("We agree with the trial court that the plaintiffs are not entitled to consideration of that claim because of the existence of a legally sufficient procedure, under article first, § 11, of the constitution

of Connecticut, to obtain just compensation for the alleged taking of their property.")

Prior to *SanRemo Hotel,* the U.S. Court of Appeals for the Eighth Circuit showed care about how the state court should handle Johnson's *Williamson* as-applied Just Compensation Clause § 1983 claim. The Eighth Circuit stated that it was up to the state court to determine the "precise reach" of the 2000 final judgment and to provide whatever post-judgment remedies were available for Johnson's situation. *Johnson,* 360 F.3d at 819-20.

Contrary to the Eighth Circuit's decision, the Minnesota courts declined Johnson's declaratory judgment claims to define the "precise reach" of the 2000 final judgment and found that state law provided no post-judgment remedies for Johnson. App. 30.

The state court precluded review of the new federal claims under res judicata and collateral estoppel. The Eighth Circuit also stated that if Johnson was unsatisfied with the state court adjudication of his *Williamson* as-applied Just Compensation Clause § 1983 claim, he could petition the U.S. Supreme Court – which he has done here. *Id.* at 819.

After *SanRemo Hotel,* the Texas Supreme Court determined that a landowner's *Williamson* as-applied Just Compensation Clause § 1983 claim was ripe at the time of enactment of the applicable ordinance. *Hallco Texas, Inc. v. McMullen County,* 221 S.W.3d 50, 50 Tex. Sup. Ct. J. 314 (Tex. 2006). The Texas Supreme Court declared, "Hallco's taking claim was ripe upon enactment because at that moment the

'permissible uses of the property [were] known to a reasonable degree of certainty.'" *Id.* at 60, *citing Palazzolo v. Rhode Island,* 533 U.S. 606, 620 (2001). The Texas Supreme Court concluded that the claim was barred by res judicata.

Similarly, the consequence of the Minnesota Court of Appeals' application of res judicata and collateral estoppel *from* the challenged prior state court judgment *to* Johnson's *Williamson* as-applied Just Compensation Clause § 1983 claim is that Johnson only had the right to bring his yet-to-be-discovered claim during the initial condemnation proceeding.

If the res judicata and collateral estoppel approach of the state courts in California, Connecticut, Texas and Minnesota are allowed to continue to exist, it requires a property owner, in the initial condemnation proceeding, to *anticipate* an unknown state court adjudication denying compensation for governmental takings under state law – compensation otherwise required under the Fifth Amendment's Just Compensation Clause.

These four states require the assertion in the initial litigation of a yet un-provable § 1983 allegation, immediately challengeable as a frivolous claim, subject to summary judgment practice and dismissal, and possible Rule 11 sanctions imposed upon the asserting attorney.

Nonetheless, the state cases from California, Connecticut, Texas and now Minnesota have adopted this rule – violating the guarantees of *Williamson* and its successor *SanRemo Hotel* that a landowner

has an actionable *Williamson* as-applied Just Compensation Clause § 1983 claim *after exhausting state* judicial procedures when the state court awards insufficient compensation in violation of the Just Compensation Clause – as happened here to Johnson. Basically, the state courts apply res judicata and collateral estoppel based on the prior state court judgment being challenged to ignore, not determine, the *Williamson* as-applied Just Compensation Clause § 1983 claim.

If this Court allows this to stand, the state courts become the proverbial fox watching the chicken coop. After determining "no compensation under state law" the state courts are then asked under *SanRemo Hotel* to *simultaneously* re-consider their decisions under a *Williamson* post-judgment, as-applied Just Compensation Clause § 1983 analysis.

It can be done – as a fox can watch a chicken coop. Thus, the concurring opinion in *SanRemo Hotel* is correct, "The basic principle that state courts are competent to enforce federal rights and to adjudicate federal takings claims is sound." *Id.* at 351.

However, no matter how sound, there needs to be rules to ensure consistent, nationwide treatment of the "chickens" – as the next two sections address.

B. Determining the Accrual of As-Applied Just Compensation Clause § 1983 Claims Will Reconcile Existing Conflicts Among, and Unequal Treatment Being Provided by, the Lower Courts.

Prevention of unequal treatment under the law governing Just Compensation Clause § 1983 claims begins with determining the time of the claim's accrual. For example, in the instant case, the Minnesota court did not determine when the claim accrued. Without acknowledgment of the accrual of a *Williamson* as-applied Just Compensation Clause § 1983 claim, the lower court applied res judicata and collateral estoppel to a claim that may have accrued upon entry of the 2000 final judgment which the court in turn, used in self-contradiction to apply res judicata and collateral estoppel. If the as-applied Just Compensation Clause § 1983 claim accrues upon entry of the state court final judgment, then the Minnesota court, as other jurisdictions, by applying the preclusive doctrines deprives the landowner of an opportunity to seek remedies guaranteed by the Just Compensation Clause.

In *Williamson,* this Court said a property owner "has not suffered a violation of the Just Compensation Clause until the owner has unsuccessfully attempted to obtain just compensation through the procedures provided by the State for obtaining such compensation" and that "the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just

compensation." *Id.* at 195, *quoted in SanRemo Hotel,* 545 U.S. at 325. Thus, under *Williamson* and *SanRemo Hotel,* the Johnsons suffered a "violation of the Just Compensation Clause" on January 5, 2000 upon the entry of the state court condemnation final judgment.

Similarly, the U.S. Court of Appeals for the Seventh, Eighth, and Ninth Circuits recognize accrual of the as-applied Just Compensation Clause § 1983 claim upon entry of the state court final judgment denying constitutionally-required just compensation. The Ninth Circuit recognized the necessity of a final decision because otherwise the claim is premature and non-judiciable:

> [I]n suits for wrongful deprivation of property under 42 U.S.C. § 1983, the same considerations that render a claim premature prevent accrual of a claim for limitations purposes, and the claim does not accrue until the relevant governmental authorities have made a final decision on the fate of the property. [Plaintiff] was entitled, indeed required, to await the final decision of the county without commencement of the statute of limitations.

Norco Construction v. King County, 801 F.2d 1143, 1146 (9th Cir. 1986). The Seventh Circuit agrees: "Not having availed himself of the inverse condemnation provided in Illinois, Biddison's federal taking claim is not ripe and has not yet accrued for the statute of limitations. His federal claim will ripen, and the

statute of limitations will begin to run, if and when Biddison is denied just compensation by the state courts." *Biddison v. City of Chicago*, 921 F.2d 724, 726 (7th Cir. 1991). The Eighth Circuit, citing *Williamson,* similarly stated "[T]akings claims are not ripe for adjudication in federal court unless and until they have been exhausted in state administrative and judicial proceedings." *Johnson,* 360 F.3d at 818.

Contrary to *Williamson, SanRemo Hotel* and the decisions of the Seventh, Eighth, and Ninth Circuits, the state courts of California, Connecticut, Texas, and Minnesota hold that the *Williamson* as-applied Just Compensation Clause § 1983 claim accrue at the time of the original taking and not upon entry of the state court condemnation final judgment.

The state courts' abandonment of Supreme Court precedent allows the preclusion of any review of *Williamson* as-applied Just Compensation Clause § 1983 claims because res judicata and collateral estoppel are being applied from the *challenged state court judgment.* Thus, in at least four states, the *Williamson* as-applied Just Compensation Clause § 1983 claim guaranteed in *Williamson* and re-guaranteed in *SanRemo Hotel* does not exist.

This Court should consider adopting a uniform rule that *Williamson* as-applied Just Compensation Clause § 1983 claims accrue upon entry of the state court condemnation final judgment that is claimed to not provide the constitutionally-required just compensation and/or challenged due to the inadequacy of

the state procedures leading thereto. In that way, plaintiffs with *Williamson* as-applied Just Compensation Clause § 1983 claims will be treated equally under federal law by the respective state courts.

C. A Determination of What Constitutes a "full and fair opportunity to be heard" is Required Before the Application of Res Judicata and Collateral Estoppel Principles to a *Williamson* As-Applied Just Compensation Clause § 1983 Claim Challenging a Prior State Court's Condemnation Judgment and State Procedures.

Challenging a state court's judgment or the inadequacies of state procedures under a *Williamson* as-applied Just Compensation Clause § 1983 claim requires knowing the parameters of what constitutes a "full and fair opportunity to be heard." This is of paramount importance if a state court can apply res judicata and collateral estoppel to a *Williamson* as-applied Just Compensation Clause § 1983 Claim challenging a prior state court condemnation judgment. Here, Minnesota courts, as well as courts in California, Connecticut and Texas, preclude the federal claims.[7]

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[7] *Infra*, *Breneric Assoc.* at 69 Cal.App.4th 166; *Melillo* at 249 Conn. 138; *Hallco Texas, Inc.* at 211 S.W.3d 50; *Johnson* at 2008 Minn. App., 2008 WL 434680 (Feb. 19, 2008).

First, for instance, if the claim accrues upon the entry of the state court's final judgment, principles of res judicata and collateral estoppel do not apply at all. Prior proceedings leading to challenges of the state court's final judgment do not and cannot provide a "full and fair opportunity to be heard" on the post-judgment *Williamson* as-applied Just Compensation Clause § 1983 claim – as the Minnesota Court of Appeals and the other state courts have held. In essence, landowners claiming that a state court judgment does not fully compensate them in violation of the Just Compensation Clause acquire a new, available post-judgment § 1983 claim upon entry of final judgment. Res judicata and collateral estoppel, by definition, do not apply because it is a new post-judgment claim and a new post-judgment legal issue accruing upon entry of final judgment.

Second, *SanRemo Hotel* and the Eighth Circuit before *SanRemo Hotel* correctly indicated that the landowner even with a *Williamson* post-judgment as-applied Just Compensation Clause § 1983 claim should proceed primarily for claims under state law and *in the alternative* assert in state court the *Williamson* as-applied Just Compensation Clause § 1983 claim. *SanRemo Hotel,* 545 U.S. at 325; *Johnson,* 360 F.3d at 819. Instead, however, the state courts in California, Connecticut, Minnesota, and Texas, respond to *the alternative Williamson* and/or *SanRemo Hotel* by applying res judicata and collateral estoppel to *Williamson* post-judgment as-applied Just Compensation Clause § 1983 claims – frustrating the express mandate of *SanRemo Hotel.*

Third, a consistent judicial balance can and should be achieved. The *SanRemo Hotel* decision to establish a state-litigation requirement for *Williamson* as-applied Just Compensation Clause § 1983 claims necessitates a consistent, nationwide application of the doctrine of res judicata and collateral estoppel – particularly the element of a "full and fair opportunity to be heard." Here, Johnson has not had an "opportunity to be heard" because of the state court's erroneous application of res judicata and collateral estoppel. Simply, Johnson did not get his day in court on his federal claims. For Johnson and others like him in the future to be treated equally, the Court needs to establish a standard for the state courts of what a "full and fair opportunity to be heard" means in the context of the *Williamson* post-judgment as-applied Just Compensation Clause § 1983 claim.

II. The Court Should Resolve Whether Temporary Physical Takings Claim Fall Under *Teleprompter*'s Mandate That Every Taking be Justly Compensated.

The Just Compensation Clause is a balance. It permits the government to occupy private property for a public purpose often without a pre-deprivation hearing. However, it requires the government to pay just compensation for all takings. The Minnesota Court of Appeals' opinion states that the Just Compensation Clause does not apply to temporary physical takings – an important federal issue. App. 36-37. The lower court distinguishes permanent physical takings which require compensation under *Teleprompter* from

temporary physical takings which do not require compensation.

The Minnesota Court of Appeals' decision, by identifying the governments' occupation of private property for intended public purpose but finding no just compensation required, attempts to create an exception from a series of U.S. Supreme Court decisions protecting landowners' property from uncompensated governmental takings by mandating just compensation for each and every physical appropriation of property, no matter how small.

First, the U.S. Supreme Court in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982) held that the federal Fifth Amendment requires all physical takings be compensated – no matter how small. In *Teleprompter Manhattan CATV Corp.*, the adjudicated taking was in connection with cable television company's installation of "crossover" and "noncrossover" cables on plaintiff's five-story apartment building. *Id.* at 419.

Second, the U.S. Supreme Court in *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992), re-stated the same principle, "In general (*at least with regard to permanent invasions*), no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation. . . . " *Id.* at 1015-16 (citations omitted) (emphasis added).

Third, in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), the U.S. Supreme Court confirmed, "The clearest sort of taking occurs when the government

encroaches upon or occupies private land for its own proposed use. Our cases establish that even a minimal 'permanent physical occupation of real property' requires compensation under the Clause." *Id.* at 617 (emphasis added).

The Minnesota Court of Appeals' decision also conflicts with this Court's decision in *First English Evangelical Lutheran Church of Glendale v. Los Angeles County, Cal.*, 482 U.S. 304 (U.S. 1987) which found a valid § 1983 claim where California did not provide a compensatory remedy for temporary regulatory takings. If the Just Compensation Clause covers temporary regulatory takings, then it must cover temporary physical takings. Moreover, from the landowner's view, temporary *physical* takings are even more invasive than temporary *regulatory* takings; thus, they are at least as worthy of constitutionally-required compensation.

CONCLUSION

For all the foregoing reasons for allowance of a writ of certiorari, petitioners respectfully request the Supreme Court to grant review of this matter.

Respectfully submitted,

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This opinion will be unpublished and may not be cited except as provided by Minn. Stat. § 480A.08, subd. 3 (2006).

STATE OF MINNESOTA
IN COURT OF APPEALS
A06-2353

Ronald Richard Johnson,
Appellant,

Dee Johnson,
Plaintiff,

vs.

City of Shorewood,
Respondent,

City of Minnetonka,
Respondent,

Riley-Purgatory-Bluff Creek Watershed District,
Respondent,

Trivesco, et. al.,
Respondents,

Highland Villa Builders, Inc.,
Respondent.

Filed February 19, 2008
Affirmed
Huspeni, Judge*

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* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

Hennepin County District Court
File No. 27-CV-04-016195

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Considered and decided by Hudson, Presiding Judge; Kalitowski, Judge; and Huspeni, Judge.

UNPUBLISHED OPINION

HUSPENI, Judge

Appellant Ronald Johnson[1] challenges the district court's grant of summary judgment in favor of all named respondents. Appellant argues that the district court erred by (1) denying his request for a declaratory judgment and an additional takings proceeding under Minn. Stat. § 117.045 (2006), based on "[r]espondents' future, continued and increased flooding and other takings of [appellant's] property"; (2) dismissing appellant's 42 U.S.C. § 1983 claims and not granting his motion for partial summary judgment; (3) dismissing appellant's inverse-condemnation claim and refusing to enter a declaratory judgment

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[1] The brief filed by counsel for Ronald Johnson lists Ronald and Dee Johnson as appellants. But the notice of appeal was filed by Ronald Johnson, pro se, and it was not signed by Dee Johnson. A family member who is not a lawyer cannot file a notice of appeal on behalf of another family member. *In re Conservatorship of Riebel*, 625 N.W.2d 480, 481 (Minn. 2001). Because Dee Johnson did not perfect an appeal, Ronald Johnson is the sole appellant.

related to alleged 2000 "Vine Hill Road" takings; (4) dismissing appellant's state-law claims against respondent Trivesco; and (5) denying appellant's postjudgment motion. Because the district court did not err in any of its determinations, we affirm.

FACTS

Appellant and his wife purchased an undeveloped 20-acre parcel of land located in Hennepin County, City of Shorewood, in 1981. The property is bordered to the east by Vine Hill Road which abuts respondent City of Minnetonka. In 1973, by city ordinance, respondent City of Shorewood designated approximately 60% of the subject property as wetlands. And a portion of the subject property was designated wetlands on the 1980 National Wetlands Inventory map prepared by the United States Fish and Wildlife Service. Beginning in early 1993, appellant contacted the United States Army Corps of Engineers (Corps), disputing the existence of these wetlands.

At the time of purchase, a drainage ditch crossed the subject property and emptied into a creek to its south. Shorewood's Waterford subdivision was constructed to the south and west of the subject property beginning in 1984. Waterford was developed by respondent Trivesco, a Minnesota general partnership. Trivesco is in partnership with respondents Robert H. Mason, Inc., Highland Properties, Inc., and Steiner & Koppelman, Inc. In 1984, in connection

with the planned Waterford subdivision, Shorewood constructed a road berm, culvert, and a pond-control structure to the south of the subject property. Respondent Riley-Purgatory-Bluff Creek Watershed District was involved in designing the pond-control structure and designated a 100-year storm-event flood plain at an elevation of 917.1 feet above sea level and prohibited construction at elevations lower than 919.1 feet. The pond-control structure raised the bottom of the drainage ditch above its original elevation and created a pond near the southern boundary of the subject property. Because the drainage ditch was raised, subsequent rains began flooding the subject property.

"Outlot C" is "a narrow, irregularly shaped outlot" between the southern boundary of the subject property and a public street called Waterford Circle. Trivesco purchased Outlot C on a contract for deed recorded on October 2, 1984. On June 3, 1985, Trivesco and appellant signed an "acknowledgment letter," which granted appellant the right to purchase Outlot C "for $60,000 representing the utility and street assessments." This June 3, 1985 agreement is referred to by appellant as a "contract for deed." On August 12, 1985, as part of the governmental approval process for the Waterford subdivision, Shorewood approved Trivesco's amended development agreement. As part of the amended development agreement with Shorewood, Trivesco agreed to sell Outlot C to appellant. On September 19, 1985, Trivesco recorded a "Declaration of Covenants, Conditions,

Restrictions and Reservations for Waterford" with the Hennepin County Registrar which specifically encumbered Outlot C. The Waterford declaration established that an "architectural control committee" must approve plans for all construction within the Waterford subdivision. Twenty-two years after the alleged "contract for deed," Trivesco remains the owner of Outlot C. And the Waterford declaration expired by its terms on September 19, 2005.

Beginning in 1992, the Ashcroft subdivision was constructed by Chimo Development Corp. to the east of Vine Hill Road. Highland Properties, Inc. served as a sales agent for Chimo. Respondent Highland Villa Builders, Inc. managed the construction of Ashcroft.

In April 2000, the Shorewood City Council approved construction of a bike path/walking trail along the west side of Vine Hill Road. In early June 2000, Shorewood moved construction equipment onto the subject property for the purpose of constructing the trail and placed a silt fence on the subject property. The equipment remained on appellant's property for less than one day. The silt fence was removed one week later, on June 13, 2000. Shorewood has not authorized public use of the trail. A private company, not joined in this action, applied for a permit from Shorewood to install fiber optic cable along the west side of Vine Hill Road. Although Shorewood denied the company's permit application, the company did install cable to the west of the roadway.

By way of background, this case involves the fifth lawsuit filed by appellant regarding alleged takings of his property. Appellant's first lawsuit, "the takings case," was filed in Hennepin County District Court in 1991. Appellant successfully alleged that Shorewood had taken his property without compensation and obtained a writ of mandamus compelling Shorewood to commence inverse-condemnation proceedings. Appellant's second action, filed in Hennepin County District Court in 1996 against the City of Minnetonka, alleged that the Ashcroft subdivision had been diverting storm water run-off onto his property as early as 1992. The action was dismissed without prejudice for failure to join necessary parties, and appellant did not appeal the dismissal. Appellant filed a 24-count complaint in United States District Court in 2000 as his third lawsuit, alleging numerous constitutional and state-law violations. This suit was eventually dismissed by the Eighth Circuit. Appellant's fourth lawsuit was filed in the Court of Federal Claims in 2001, alleging (1) both physical and regulatory takings arising out of the 1984 flooding, (2) tort claims against the government, and (3) that the United States Fish and Wildlife Service, by designating part of the subject property a wetland on its 1980 inventory map, had breached implied and/or express contracts with appellant. All claims were dismissed – unchallenged by appellant – based on the statute of limitations, lack of jurisdiction, and Fed.R.Civ.P. 12(b)(6), respectively. In 2004, for his fifth lawsuit, appellant refiled his 24-count 2000 federal complaint in Hennepin County District Court. In this current

appeal, appellant challenges the district court's determination that all named respondents are entitled to summary judgment.

I. The Takings Case.

In his 1991 suit against Shorewood, appellant claimed that his land had been taken without just compensation, and alleged specifically that, despite the pond-control structure, the pond frequently flooded his property with overflowing storm-sewer water. Appellant also claimed that actions taken by Shorewood related to a plat-approval application, which prevented his development of the subject property, amounted to a taking.

The district court determined that the flood-plain restrictions were not a regulatory taking but that in creating the pond and control structure Shorewood had physically taken appellant's property up to 914 feet since December 31, 1984, because the water would rise to that elevation during "major storm events." The district court agreed with appellant and issued a writ of mandamus compelling Shorewood to commence condemnation proceedings for the purpose of acquiring a drainage easement on appellant's property up to 914 feet above sea level. The district court also ordered Shorewood to pay appellant's attorney fees and costs related to the action. The district court concluded that the flooding constituted a taking because appellant's property "is expected to flood to this level with sufficient frequency to constitute a permanent

physical invasion." Although appellant argued that the taking occurred to 919.1 feet, the level below which development is restricted based on the 100-year flood event, the district court rejected that argument because "it is difficult to conceive of any case in which short-term flooding once every 100 years or so would be considered a permanent physical invasion."

Shorewood challenged the district court's award of attorney fees and its determination that there had been a taking. The district court's decision was affirmed by this court. *Johnson v. City of Shorewood,* No. CX-93-2452 (Minn. App. May 11, 1994), *review denied* (Minn. July 15, 1994). The condemnation petition was filed by Shorewood with the district court, and commissioners were appointed to determine appellant's damages. The commissioners awarded appellant $2,000 for the taking (the easement), $3,000 repair costs, and $500 as reasonable appraisal fees. Appellant then challenged the amount of the commissioners' award and the scope of the taking. On October 25, 1995, the district court found that appellant's objections regarding the scope of the taking were barred as untimely because the scope was determined by the June 1993 court order. But the district court did allow a jury to determine the value of the taking.

Three letters from the Corps dated March 2 and 17, 1993, and February 7, 1994, were admitted into evidence at the takings trial. During the trial, Shorewood's expert testified that, in his opinion, the Corps

had determined that the property contained a wetland. The expert based his testimony on the fact that appellant had applied for a permit from the Corps to excavate a ditch on the subject property. And if the Corps had determined that it did not have jurisdiction over that property, it would have issued a no-jurisdiction order, not an exemption or permit. The Corps letter of March 2, 1993, explained how appellant's proposed agricultural ditch maintenance work might qualify for an exemption. By letter dated March 17, 1993, the Corps noted that, based on the information it had available, including the National Wetland Inventory maps, the property did contain wetlands. The February 7, 1994 Corps letter reiterated that "the effected area appears to have been a wetland before the dam and road construction in the mid 1980s and it appears to remain a wetland today." Appellant's expert testified to the contrary, stating that the subject property was pre-taking dry land and that "the only reason any portion of [appellant's] property appears as a designated wetland is a result of the [1973] City ordinance[.]" Eventually appellant was issued an exemption by the Corps.

The district court did not refer to the Corps' letters or the allegedly erroneous 1980 National Wetlands Inventory map in its decisions. Rather, the district court's analysis focused on the 1973 city ordinance, holding that because the wetland designation occurred prior to appellant's purchase of the subject property, appellant had no basis for arguing

that any of the property rights he purchased were taken.

In October, 1996, the jury found that, although there was a difference of "$0" between the value of the property before the taking and its value after the taking, appellant was entitled to $2,000 for "the easement actually taken" and $63,000 for "the reasonable cost of clean-up" related to the flooding/taking. The district court vacated the $2,000 award because it concluded that it was inconsistent with the jury's finding that there was no diminution in the property's fair-market value due to the taking.

Shorewood moved for judgment notwithstanding the verdict and for a new trial, arguing that appellant should not be entitled to the $63,000 for "clean-up" costs[2] because, without a reduction in the property's value, there had been no taking. Notably, appellant did *not* challenge the amount of the award or the jury's conclusion that the fair-market value of the property was restored to its pre-taking value by the clean-up award.[3] Both of Shorewood's motions were

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[2] The clean-up costs appear to be based on clearing dead trees from the drainage ditch. Appellant testified that the flooding caused by Shorewood killed a number of mature trees and that his time cleaning up the property (3,400 hours) should be compensated at an appropriate hourly rate ($20).

[3] Appellant did challenge that the interest was calculated at the statutory rate, arguing that the interest should have been awarded based on the average interest rate for fixed-rate, 30-year, first mortgages compounded annually. The district court rejected his argument as part of the final judgment January 5,

(Continued on following page)

denied. The district court concluded that "[i]t was proper for the jury to consider the cost of clean-up in that a potential buyer would clearly take into consideration the cost of cleaning up the property and arriving at its market value." Shorewood appealed the district court's denial of its motions. This court affirmed the district court in April 1998. *City of Shorewood v. Johnson,* No. C5-97-1525, 1998 WL 188561 (Minn. App. Apr. 21, 1998). This court ruled that it was proper for the jury to award "clean-up" costs despite its finding that the property's value was not diminished by the taking because

> [t]he jury may have found there was no diminution in market value from the taking only because [appellant] *prevented* a diminution in market value by restoring [his] property to its pre-flood condition, incurring significant costs in doing so. If [appellant] had *not* cleaned up the damage, the property's fair market value would have been diminished because potential buyers would have subtracted clean-up expenses from the price they would pay for the property.

Id. at *2. On May 18, 1998, Shorewood paid appellant $116,480.16 in satisfaction of the $63,000 award, plus

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2000, finding that the statutory interest rate provides reasonable and just compensation and that essentially appellant received a "windfall" because Shorewood agreed to pay interest on the entire amount from the date of the taking as opposed to when the costs were actually incurred.

interest accrued from January 1, 1985, to the date of payment.

A final judgment in the takings case was entered January 5, 2000, granting appellant's motion for costs. On April 5, 2000, Shorewood paid appellant the $67,335.95 that he was awarded in costs.

II. The Federal Case/The Current Case.

On June 22, 2000, appellant filed a 24-count complaint with the United States District Court alleging constitutional violations, naming all of the respondents involved in the current case and the United States and the Corps as defendants. Generally, the federal district court dismissed on July 11, 2001, "[a]ll claims arising from the prior state court litigation" against Shorewood and Minnetonka because they were barred by collateral estoppel and dismissed the remaining claims because they "either are unripe or are supplemental state law claims over which the Court declines to exercise jurisdiction." Following a challenge by appellant, the federal courts did not award him any of the relief he requested. *Johnson v. City of Shorewood,* 360 F.3d 810, 820 (8th Cir. 2004). The United States Supreme Court denied further review. *Johnson v. City of Shorewood,* Minn., 543 U.S. 810, 125 S. Ct. 43 (2004).

Within a month of the Supreme Court's denial of certiorari, appellant filed the same 24-count complaint with Hennepin County District Court. The sole difference between the 2004 state complaint and the

2000 federal complaint is that the former omitted the United States and the Corps as named defendants:

> *i.* The attached federal complaint (previously served on [respondents'] counsel) is referenced and incorporated as though entirely rewritten herein with the state caption above as to all [appellant's] state and common law claims, expressed or implied, including [appellant's] 42 U.S.C. § [§] 1983, 1985 claims including U.S. Const. Just Compensation.
>
> *ii.* On March 5, 2004 the U.S. Eighth Circuit Court of Appeals on jurisdictional ground referred [appellant's] federal claims to the federal claims court and [appellant's] state and common law claims to this state court including the U.S.C. §§ 1983, 1985 state takings claims. On October 4, 2004 the U.S. Supreme Court denied review.
>
> *iii.* The remainder of the complaint follows. The claims are tolled under 28 U.S.C. § 1367(d).

As characterized by the Eighth Circuit, the 24-count complaint's "primary allegation is that the [respondents] have, individually and in concert, effected various regulatory and physical takings of [appellant's] property and conspired to prevent [him] from receiving just compensation." *Johnson,* 360 F.3d at 814. More specifically, the counts of the complaint and their disposition by the Eighth Circuit and Hennepin County District Court can be divided into four categories: (1) claims brought under 42 U.S.C.

§§ 1983 and 1985; (2) two declaratory-judgment requests; (3) state-law claims; and (4) claims not appealed here.

A. 42 U.S.C. §§ 1983 and 1985 Claims.

Eight counts of appellant's complaint were brought under 42 U.S.C. §§ 1983 and 1985, alleging physical and regulatory takings of the subject property and that his due process and equal protection rights had been violated.

1. Eighth Circuit.

The Eighth Circuit held that appellant did not produce evidence of a conspiracy sufficient to survive summary judgment under 42 U.S.C. § 1985. *Id.* at 817-18. Although appellant created a "voluminous record, including an affidavit by the former mayor of Shorewood," appellant failed to point to specific facts tending to show an illicit agreement and merely speculated to its existence. *Id.* (footnote omitted).

The United States District Court had concluded that the only potential violation of 42 U.S.C. § 1983 was the alleged taking of appellant's property without just compensation. *Id.* at 818. Upon review, the Eighth Circuit determined that the United States District Court lacked jurisdiction to make that determination under the *Rooker-Feldman* doctrine because the "alleged constitutional injury stems from claims adjudicated in the prior state court judgment . . . [appellant is] asking the federal court for the

same remedy requested in the state court action: just compensation. Moreover, the claims may be unripe . . . because [appellant] failed to appeal the sufficiency of the state court jury award" in the takings case. *Id.* at 818-19 (quotation and citations omitted).

As noted by the Eighth Circuit, since the first state proceeding, appellant has been collaterally estopped from challenging the wetland designation because it was already adjudicated then upon a motion for summary judgment. *Id.* at 815 n. 6.

Finally, the Eighth Circuit noted in dicta:

> Shorewood suggests that not only does collateral estoppel bar consideration of claims actually litigated, res judicata bars claims that could have been litigated during the state court proceedings. Perhaps so, but in light of our holding that *Rooker-Feldman* deprived the district court of subject matter jurisdiction, we need not address this argument. Because *Rooker-Feldman* and *Williamson County* preclude federal review of [appellant's] various takings claims, the determination regarding the precise reach of the state court judgment is a matter for the state courts to decide.

Id. at 820.

2. Hennepin County District Court.

The district court held that "all claims arising out of the 1984 flooding are . . . barred by the doctrines of

res judicata, collateral estoppel and the applicable statute of limitations." They "have been fully and fairly litigated to a final resolution as evidenced by state and federal actions." The district court found that "[f]acts asserted regarding alleged taking in June 2000 are insufficient to support a claim" because the silt fence was immediately removed upon appellant's request, the walking trail "was never constructed" and, further, "[a]ny preparatory actions taken by Shorewood were upon a public dedication." And because "it is undisputed between the parties that Shorewood is not responsible for the installation of the fiber optic cable, nor did Shorewood issue a permit for it to be placed on [appellant's] property," Shorewood could not be held responsible for that invasion.

B. Declaratory Judgment Claims.

Two counts of appellant's complaint sought declaratory judgments.

1. Eighth Circuit.

For the remaining federal claims, the Eighth Circuit concluded that, although not barred by *Rooker-Feldman,*

> all of the claims which [appellant] failed to present in the state litigation, as well as all of the claims which arose after the state court fixed the takings issues to be decided, are unripe for adjudication in federal court

> because [appellant has] failed to pursue state postdeprivation remedies for those alleged takings.

Johnson, 360 F.3d at 819 (citing *Kottschade v. City of Rochester,* 319 F.3d 1038, 1042 (8th Cir. 2003), *cert. denied,* 540 U.S. 825 (2003)).

2. Hennepin County District Court.

The district court, in an exercise of its discretion citing Minn. Stat. § 555.06 (2006), denied appellant's requests for declaratory judgments.

C. State-Law Claims.

Twelve counts of appellant's complaint involved state-law claims related to breach of contract, promissory estoppel, fraud, misrepresentation, negligence, tortious conduct, and slander of title. Appellant sought specific performance and requested that another inverse-condemnation proceeding be compelled.

1. Eighth Circuit.

The Eighth Circuit held that the district court did not abuse its discretion by declining to exercise supplemental jurisdiction over the state-law claims and dismissed them without prejudice. *Johnson,* 360 F.3d at 819. Regarding appellant's claims of misrepresentation and fraud, the Eighth Circuit noted that federal review was barred under *Rooker-Feldman* and

noted that "[appellant's] remedy, *if any* is to return to state court and utilize its procedures for remedying fraud." *Id.* at 819 (emphasis added).

2. Hennepin County District Court.

The district court dismissed the counts related to breach of contract, holding that appellant has "failed to establish that there were any implied or express contracts between the parties," and without this, a breach cannot be shown. From that conclusion, the district court was compelled to deny appellant's requests for specific performance of the alleged contracts. The district court dismissed the negligence and tort claims because they "either stem from the 1984 flooding and are barred by collateral estoppel or are based on unsupported claims of takings in 2000 . . . or are barred by the applicable statute of limitations." The district court found that the fraud and misrepresentation claims failed because appellant "offered no evidence that would show the existence of a conspiracy . . . [in the federal court action and] failed to offer any additional evidence, . . . but instead made the decision to rely on allegations in the previous Complaint." The district court found that the claim for slander of title was either barred by collateral estoppel or the statute of limitations because it arises out of the 1984 flooding of the subject property.

D. Other Claims.

The remaining two counts of appellant's complaint, an alleged Freedom of Information Act violation and a request to preserve the right to amend pleadings after discovery, were not challenged on appeal.

Thus, this appeal is limited to challenging the summary-judgment determination in favor of respondents on the 22 remaining claims.

DECISION

The scope of review applicable to a grant of summary judgment is whether there are any genuine issues of material fact and whether the district court erred in its application of the law. *Wallin v. Letourneau,* 534 N.W.2d 712, 715 (Minn. 1995). If no material facts are at issue on appeal, the reviewing court need only determine whether the district court erred in applying the law regarding the accrual of the cause of action and the running of the statute of limitations. *Peterson v. Johnson,* 720 N.W.2d 833, 837 (Minn. App. 2006) (quoting *Brock v. Park Nicollet Health Servs.,* 660 N.W.2d 439, 441 (Minn. App. 2003), *review denied* (Minn. July 15, 2003)). Although an appellate court reviews the evidence in a light most favorable to the nonmoving party, and is prohibited from *weighing* the evidence, it is not enough for the nonmoving party to show some metaphysical doubt. *DLH, Inc. v. Russ,* 566 N.W.2d 60, 70-71 (Minn. 1997) (holding that a court is not required to ignore its conclusion that a piece of evidence has no probative value).

A challenge to the district courts application of a statute of limitations is a question of law to be reviewed de novo. *Antone v. Mirviss,* 720 N.W.2d 331, 334 (Minn. 2006). And whether a taking has occurred is question of law, also to be reviewed de novo. *Fitger Brewing Co. v. State,* 416 N.W.2d 200, 205 (Minn. App. 1987), *review denied* (Minn. Feb. 23, 1988).

The applicability of collateral estoppel is subject to de novo review. *Falgren v. State, Bd. of Teaching,* 545 N.W.2d 901, 905 (Minn. 1996). Applying collateral estoppel is appropriate if all of the following are satisfied:

> 1) the issue must be identical to one in a prior adjudication; 2) there was a final judgment on the merits; 3) the estopped party was a party or was in privity with a party to the prior adjudication; and 4) the estopped party was given a full and fair opportunity to be heard on the adjudicated issue.

Care Inst., Inc.-Roseville v. County of Ramsey, 612 N.W.2d 443, 448 (Minn. 2000).

Broader than collateral estoppel, res judicata precludes relitigating entire claims rather than specific issues. *Klinefelter v. Crum & Forster Ins. Co.,* 675 N.W.2d 330, 336 (Minn. App. 2004) (citing *Hauser v. Mealey,* 263 N.W.2d 803, 806 (Minn. 1978)). From that principle, res judicata applies equally to claims that actually were litigated and claims that *could have been* litigated in the earlier action. *Brown-Wilbert, Inc. v. Copeland Buhl & Co.,* 732 N.W.2d 209,

220 (Minn. 2007). Res judicata precludes parties from raising subsequent claims in a later action when:

> (1) the earlier claim involved the same set of factual circumstances; (2) the earlier claim involved the same parties or their privities; (3) there was a final judgment on the merits; [and] (4) the estopped party had a full and fair opportunity to litigate the matter.

Id. (quoting *Hauschildt v. Beckingham,* 686 N.W.2d 829, 840 (Minn. 2004)). The applicability of res judicata is a question of law reviewed de novo. *Id.*

I.

Appellant argues first that the district court erred by not granting him a proceeding under Minn. Stat. § 117.045 (2006), based on respondents' "future, continued, and increased flooding and other takings" of the subject property and a declaratory judgment. Appellant argues further that this section "statutorily preempts any res judicata or collateral estoppel effect from Shorewood's prior condemnation proceeding because the governmental . . . takings were 'omitted' from Shorewood's prior condemnation proceeding." Moreover, appellant argues that even the *litigated* taking was essentially "omitted" because appellant only received damages for his "clean-up costs" and he argues he received "ZERO" compensation for the taking itself. We disagree with appellant's interpretation of the statute. Moreover, appellant's claims based on flooding are barred by the doctrines of res judicata

and collateral estoppel, and, in some cases, a statute of limitations. And although the district court incorrectly determined that, when the underlying cause of action is barred by a statute of limitations, a declaratory judgment is per se inappropriate, a denial here was nonetheless within its discretion.

> Upon successfully bringing an action compelling an acquiring authority to initiate eminent domain proceedings relating to a person's real property which was omitted from any current or completed eminent domain proceeding, such person shall be entitled to petition the court for reimbursement for reasonable costs and expenses, including reasonable attorney, appraisal and engineering fees, *actually incurred in bringing such action.*

Minn. Stat. § 117.045 (emphasis added).

This statute does not allow a claimant to recover damages for omitted *takings*. And it does not indicate that if a claimant does not receive compensation for a taking that it is "omitted." Rather, it provides that a claimant may later recover costs associated with the prior action. Because appellant's claimed damages are not related to costs actually incurred in the prior eminent-domain action, the district court did not err in denying a request for a proceeding pursuant to Minn. Stat. § 117.045. Appellant misinterpreted the breadth of this statute, and we shall apply the doctrines of res judicata and collateral estoppel.

A. Res Judicata and Collateral Estoppel.

Appellant's central argument appears to be that the jury-awarded damages in 1996 did not justly compensate him for the flooding takings which began in 1984. During the original takings proceedings, appellant was prevented from relitigating the scope of the taking. And res judicata and collateral estoppel preclude him from doing so here.[4]

Over a nine-year period, appellant's inverse-condemnation claims against Shorewood, related to the flooding takings, were fully and fairly litigated, resulting in his just compensation. This action involves the same set of facts as the earlier case that had a final judgment on the merits on January 5, 2000, after several reviews by this court. And appellant, the estopped party, was the party involved in the earlier action. Appellant argues that, because of the "misrepresentation" that the subject property included a pre-taking wetland, he did not have a full

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[4] Claims related to the Waterford subdivision/1984 flooding are also barred by the applicable statute of limitations. Appellant argues that his claims cannot be barred by a statute of limitations because "[a]pplication of any statute of limitations in this context would itself be a taking." Appellant cites no authority for this argument, and therefore it is waived. *State v. Modern Recycling, Inc.*, 558 N.W.2d 770, 772 (Minn. App. 1997). Moreover, a 15-year limitations period applies to inverse-condemnation actions. *See* Minn. Stat. § 541.02 (2006); *see also Vern Reynolds Constr., Inc. v. City of Champlin*, 539 N.W.2d 614, 618 n.2 (Minn. App. 1995), *review denied* (Minn. Dec. 20, 1995). Thus, claims related to the 1984 taking are outside of the statutory period.

and fair opportunity to litigate this matter. We disagree.

A 1993 survey of the subject property was stipulated to by the parties at a summary-judgment hearing held June 22, 1993. The Eighth Circuit, relying on the previous state court actions, concluded that "because the issue concerning the pre-ownership wetland designation relating to the Property . . . [was] already adjudicated [in the first state proceeding] . . . upon a motion for summary judgment, the doctrine of collateral estoppel clearly precludes the introduction of evidence [to the] . . . contrary." *Johnson v. City of Shorewood,* 360 F.3d 810, 815 n.6 (8th Cir. 2004) (quoting *City of Shorewood v. Johnson,* No. CD-2344, at 5 (Minn. Dist. Ct., Oct. 10, 1996, Memorandum and Order)).

But appellant argues that Shorewood *fraudulently* asserted during the takings trial that the subject property contained wetlands prior to the taking "even in contradiction of the prior District Court opinion that the damming caused the flooding on [appellant's] property" and therefore this court should refuse to invoke the preclusive doctrines. Appellant's argument appears to be based on his theory that, because the 1991 taking was based on *flooding* of the subject property, the property could not logically contain a wetland. We cannot conclude that Shorewood committed fraud.

> [A]bstract statements of law or pure legal opinions are not actionable [as fraudulent

> representations]; however, a mixed statement of law and fact may be actionable "if it amounts to an implied assertion that facts exist that justify the conclusion of law which is expressed" and the other party would ordinarily have no knowledge of the facts.

Hoyt Props., Inc. v. Prod. Res. Group L.L.C., 736 N.W.2d 313, 318 (Minn. 2007) (quotation omitted). Contrary to the fraud allegation, the record shows that the jury was presented with a battle of experts at trial. Shorewood's expert testified that he believed that because the Corps' letters indicated that they had jurisdiction over appellant's property that it did indeed contain wetlands. And this is not a matter where appellant possessed no knowledge of the facts. Appellant presented his own expert who testified that, based on his evaluation of the property, it did not contain wetlands.

Because it remains unsettled whether the land actually contains wetlands, appellant's argument that Shorewood intentionally misled the court in the takings trial must fail. In the ensuing years, appellant has repeatedly asked the Corps to confirm that the subject property does not contain wetlands and the Corps has repeatedly advised appellant that it would need to visit the subject property to make that determination. Appellant has refused to grant the Corps permission to inspect the subject property. Notably, the Corps informed appellant July 8, 2002:

> The information that you have provided indicates substantial portions of your property

> have all three of the criteria (hydrology, soils, and vegetation) necessary to be considered a wetland. Your correspondence and other documents indicate that portions of your property experience frequent inundation (several times a year). Your consultant indicates that portions of the site have organic soils and are clearly dominated by hydrophytic vegetation.
>
> The new ditch and the apparent discharge sites for the dredged material are in areas mapped as wetland on the National Wetland Inventory and the Metro Wetland Inventory maps. The Hennepin County Soil Survey identifies this part of the site as "Marsh." As stated in our previous correspondence, these sources are only indicators that wetlands may exist. An on-site visit is necessary to determine conclusively whether wetlands are on your property and, if so, their extent. While we have offered to make an on-site determination/delineation of any wetlands or other waters that might be on your property, you have not yet given us permission to do so.

Because as recently as 2002 the Corps told appellant that the information in its possession indicated that his property may have contained wetlands before he purchased it, appellant's argument that Shorewood committed a fraud on the court during the original takings trial cannot prevail.

Further, it is not clear that the jury's determination that, after appellant was compensated for clean-up

costs, there was no diminution in the property's value, was even based on the contested wetland designation. And, moreover, if appellant did not consider himself to be justly compensated by the jury's award, he should have appealed it directly. Having notably failed to do so, he is precluded from relitigating his claim here.[5]

And, because res judicata precludes later bringing claims that could have been brought in the earlier action, it is proper that the claims against Minnetonka based on alleged Ashcroft-subdivision-related flooding are also barred. Appellant admitted that as early as 1992, he suspected that the Ashcroft subdivision was causing additional flooding of his property. Although at this point the takings litigation had commenced, appellant should have joined Minnetonka as a necessary party to the litigation because

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[5] We recognize that an argument can be made that the takings award *was* insufficient. Because the jury found that there was no diminution in the value of appellant's property *because of* the clean-up work performed by appellant, it does seem logical that as the flooding continued more clean-up would be required through the years. But the very reason that this flooding was considered a taking was because it was expected to be of a sufficiently regular nature. Had it been more sporadic appellant's potential claim would have been in tort for nuisance or trespass. *See Vern Reynolds,* 539 N.W.2d at 619. Appellant had the opportunity to fully litigate this taking over nine years and is precluded from making these arguments here. Notably, respondent *Shorewood* was the party who challenged the damages award on appeal; based on his inaction, appellant presumably was satisfied.

its omission may have left Shorewood to "incur[] double, multiple, or otherwise inconsistent obligations." Minn. R. Civ. P. 19.01.

Because the remaining respondents are non-governmental, their actions cannot constitute a taking in the constitutional sense.

And, finally, we note that although appellant argues that he is merely following the Eighth Circuit's directive by returning to state court, the federal appellate court did not suggest that appellant was actually entitled to relief. *Johnson,* 360 F.3d at 819 (stating that appellant's remedy "if any" was to return to the state courts). Rather, the Eighth Circuit explained that, under the *Rooker-Feldman* doctrine, federal appellate review was precluded. *Id.* After reviewing the claims in the proper forum – state court – we conclude that the district court correctly dismissed appellant's claims.

B. Declaratory Judgment.

Two counts of appellant's 24-count complaint requested a declaratory judgment. The count requesting a declaration of appellant's remaining property rights to the subject property, in addition to damages and an injunction preventing respondents from further claimed violations of appellant's property rights, is relevant here.

Under the Uniform Declaratory Judgments Act, a party may seek a declaration of his rights to remove

uncertainty. Minn. Stat. § 555.05 (2006). Under this act, courts "have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed." Minn. Stat. § 555.01 (2006). But "[t]he court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding." Minn. Stat. § 555.06 (2006). And under the concurrent-remedy rule, "equity will withhold its relief in such a case where the applicable statute of limitations would bar the concurrent legal remedy." *Cope v. Anderson,* 331 U.S. 461, 464, 67 S. Ct. 1340, 1341 (1947).

Here, because the concurrent legal remedies are barred, the district court correctly denied appellant's requests for equitable relief. No uncertainty remains because appellant has been clearly told that he cannot relitigate his takings claims. He is left with the previous judgment. It was within the district court's discretion to deny appellant's request for a declaratory judgment.

II.

Appellant also argues that the district court erred by denying his motion for partial summary judgment and by granting respondent's motion for summary judgment on appellant's 42 U.S.C. § 1983

claims against Shorewood.[6] Again, appellant argues that he never received the just compensation for the takings related to the 1984 flooding because his "1996 zero compensation award . . . was based on Shorewood's fraudulent misrepresentation that the Corps had determined a pre-taking Clean Water Act wetland on [appellant's] property." Again, we disagree. Because appellant relies on mere speculation to suggest that the wetland designation was fraudulent, and we have already disposed of that argument, summary judgment is not precluded. *See DLH, Inc.*, 566 N.W.2d at 70-71.

A. Res Judicata and Collateral Estoppel.

Although appellant asserts that he received "ZERO" in the 1991 takings case and that this violates the substantive due process he is owed under the United States and Minnesota Constitutions, appellant's assertions are both inaccurate and barred by the doctrines of res judicata and collateral estoppel. Further, because takings-related compensation is intended only to make the property owner whole, if

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[6] Because appellant does not argue that he was entitled to partial summary judgment against any other respondent regarding his section 1983 claims, those arguments are waived. *See Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982) (holding issues not briefed are waived). But because claims asserted against any other respondent essentially mirror those discussed above, this waiver causes no prejudice because our analysis would be the same as articulated there.

the net loss is zero, the compensation that is due is zero. *Brown v. Legal Found. of Washington,* 538 U.S. 216, 237, 123 S. Ct. 1406, 1420 (2003). Here, the jury awarded appellant $63,000 in clean-up costs that it reasoned were necessary to restore the subject property to its pre-taking fair-market value. And Shorewood, not appellant, challenged the amount of the award.

As aptly explained by Shorewood, appellant cannot relitigate this taking claim by simply renaming it a § 1983 claim. *See San Remo Hotel v. City & County of San Francisco,* 545 U.S. 323, 341-348 125 S. Ct. 2491, 2503-2507 (2005) (applying the doctrine of collateral estoppel to bar relitigating in federal court a takings claim already litigated in state court). And although appellant argues that he has not had a full and fair opportunity to litigate these claims because of the "fraudulent" wetland designation, appellant has challenged this designation for well over a decade, and we have already rejected the argument regarding fraud of Shorewood earlier in this opinion.

B. Other 42 U.S.C. § 1983 Claims.

Appellant explains that "[g]enerally, [his] section 1983 claims are based on Shorewood's misconduct denying [appellant] a fair and full opportunity to be heard – i.e., denied appropriate access to the state court." Given the numerous times that appellant has been heard by this court and other courts, we disagree.

And, to the extent that appellant's argument is based upon his claim that an inaccurate wetland designation effectively denied him access to the courts, we again reject this argument for the reasons set forth above.

Appellant's section 1983 claim based on equal protection was insufficiently pleaded. Mere averments set forth in the pleadings are insufficient to counter a motion for summary judgment. Minn. R. Civ. P. 56.05. Although appellant asserts generally that other landowners are allowed to develop their properties while he was precluded from doing so, he fails to point to specific similarly situated individuals who are receiving this "better treatment." *See Linberg v. Steffen,* 514 N.W.2d 779, 784 (Minn. 1994).

III.

Appellant additionally argues that the district court erred by denying his motion for a declaratory judgment/partial summary judgment against Shorewood related to the 2000 Vine Hill Road taking. Again, we disagree.

Appellant claimed that the takings included: (1) the 33-foot Vine Hill Road easement; (2) construction of the fence on June 5, 2000; (3) construction of the walking trail on June 5, 2000; and (4) installation of fiber optic cable along Vine Hill Road. The district court held that the facts asserted by appellant were insufficient to support his claims. The district court found that "[a]ny preparatory actions taken by

Shorewood were upon a public dedication and were never completed." The court also found that "[t]he 'fence' that [appellant] claim[s] to have been constructed along [his] property was a silt fence . . . [that] was immediately removed upon [appellant's] request that it be removed" and "[t]he walking trail . . . was never constructed." Finally, because it is undisputed that Shorewood did not install the fiber optic cable, nor did it issue the permit to do so, that alleged invasion could not be considered a governmental taking despite its permanence.

A party seeking compensation in a condemnation action must prove that (1) he has an interest in the condemned property at the time of condemnation; (2) the interest was taken by the government in the course of the condemnation; and (3) the interest taken is compensable. *Hous. & Redev. Auth. of City of St. Paul v. Lambrecht,* 663 N.W.2d 541, 545-46 (Minn. 2003). Here, a taking did not occur because appellant did not demonstrate he had an interest in the 33-foot portion of Vine Hill Road.

> When any road or portion of a road has been used and kept in repair and worked for at least six years continuously as a public highway by a road authority, it shall be deemed dedicated to the public to the width of the actual use and be and remain, until lawfully vacated, a public highway whether it has ever been established as a public highway or not.

Minn. Stat. § 160.05, subd. 1 (2006). And "[t]he width of the prescriptive easement . . . is not limited to that portion of the road actually traveled; it may include the shoulders and ditches that are needed and have actually been used to support and maintain the traveled portion." *Barfnecht v. Town Bd. of Hollywood Twp.*, 304 Minn. 505, 509, 232 N.W.2d 420, 423 (1975). And because the interest in the property is established by statute, appellant's argument that Shorewood has no recorded easement on this portion of the subject property lacks merit. *See Northfork Twp. v. Joffer*, 353 N.W.2d 216, 218-19 (Minn. App. 1984) (allowing the township to assert an unregistered interest in a road whereby intermittent use and maintenance of the land had been dedicated to the public statutorily). Moreover, a public dedication of a roadway may be established by the use of a small number of persons. *Id.* at 218.

Shorewood argues that for at least six years before the alleged takings of June 2000, it maintained the shoulder of Vine Hill Road located on the subject property (by mowing, weed-spraying, snow storage, and cleaning). Appellant does not dispute these asserted facts, but argues instead that applying this statute constitutes a taking even if its conditions are satisfied because it is an "unconstitutional" statute. Appellant, alleging violations of his constitutional rights, admitted that Shorewood has added a curb along the east boundary of the subject property and paved the shoulder to the curb "creating a bicycle path and to temporarily store snow." And appellant

also established in his complaint that the roadway has been used by the public.

Moreover, even if Shorewood did not already have a prescriptive easement over the property under the adverse-public-use doctrine, the facts asserted are insufficient to support appellant's claim of a taking. Appellant argues that under the Constitution a citizen must be justly compensated for even the briefest and least invasive of takings. But it is the degree of interference with an owner's property rights – resulting in a loss of interest in his real property – that determines whether the governmental action constitutes a "taking in the constitutional sense." *See Spaeth v. City of Plymouth,* 344 N.W.2d 815, 822 (Minn. 1984) (noting that the difference between a land intrusion of such frequency, regularity, and permanency, which constitutes taking, and a mere temporary intrusion, which should be left only to possible damages recovery, "is a question of degree"). If the government's use of the subject property was temporary, the landowner does not have a valid claim for a taking, but may have a claim in tort for nuisance or trespass.[7] *Vern Reynolds,* 539 N.W.2d at 619.

Here, the silt fence was on appellant's property for less than a week, and the walking trail was not graded or constructed. The fiber optic cable, although permanent, was installed by a private company

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[7] Appellant did ot assert a claim in tort for nuisance or trespass.

operating without a permit. Thus, appellant did not establish that there had been any new takings by Shorewood.

IV.

Appellant argues that the district court erred by granting Trivesco's summary-judgment motion regarding his state-law claims regarding Outlot C because they involve disputed material facts. We disagree because appellant's claims are barred by statutes of limitation.

A six-year statute of limitations applies to claims based on a "contract or other obligation." Minn. Stat. § 541.05, subd. 1(1) (2006). Promissory estoppel is considered an other obligation within the purview of Minn. Stat. § 541.05 (2006). *Deli v. Univ. of Minn.*, 578 N.W.2d 779, 781-82 (Minn. App. 1998), *review denied* (Minn. July 16, 1998). And an action to compel specific performance must be brought within the statutory period. *Lewis v. Prendergast,* 39 Minn. 301, 301-02, 39 N.W. 802, 802 (1888). A claim for tortious interference with a contract, because it resembles a breach of contract claim, is subject to the same six-year statute of limitations. *Wallin v. Minn. Dept. of Corrections,* 598 N.W.2d 393, 401 (Minn. 1999), *review denied* (Minn. Sept. 28, 1999). Absent fraud, Minnesota courts interpreting Minn. Stat. § 541.05 have held the statute begins to run when the cause of action accrues, meaning when a plaintiffs claim would survive a defendants motion to dismiss for

failure to state a claim upon which relief can be granted. *Dalton v. Dow Chemical, Co.,* 280 Minn. 147, 152-53, 158 N.W.2d 580, 584 (1968) (holding a cause accrues when plaintiff would survive a 12(b)(6) motion); *Juster Steel v. Carlson Cos.,* 366 N.W.2d 616, 618 (Minn. App. 1985) (holding a breach of contract claim must be brought within six years of the action causing the breach).

Negligence claims are also subject to a six-year statute of limitations. Minn. Stat. § 541.05, subd. 1(5) (2006).

Fraud claims are also subject to a six-year statutory limitations period. Minn. Stat. § 541.05, subd. 1(6). But if the injured party is ignorant of a cause of action because of the other partys fraud, the statutory period is tolled. *Dalton,* 280 Minn. at 153, 158 N.W.2d at 584. The statute begins to run "only from the time the cause of action is discovered or might have been discovered by the exercise of diligence." *Schmucking v. Mayo,* 183 Minn. 37, 38-39, 235 N.W. 633, 633 (1931). And a document, once properly recorded, provides constructive public notice. Minn. Stat. § 507.32 (2006).

Here, appellant claims that Trivesco (1) by entering into a restrictive covenant encumbering Outlot C breached his so-called contract to purchase the property and that (2) Trivesco "changed . . . Outlot C" to include less access to the exterior roadway. Appellant claims, further, that this "secret signing and recording" of the restrictive covenants constituted

fraud. But even assuming that the contract was binding and the signing was a fraudulent breach, a proper recording of a document cannot be done in secret. Appellant had constructive knowledge of the "breach" when the restrictive covenant was filed with Hennepin County on September 19, 1985, at which time appellant could have discovered it through a search of the public records. Further, appellant had actual notice of the "changed" dimensions of Outlot C no later than 1988, when he submitted an application to Shorewood to plat an area in the southwest corner of the subject property adjacent to Outlot C.

Thus, even if fraudulent, and even if actual notice were required, the statutory period expired no later than 1994, and appellant's state-law claims against Trivesco alleging breach of contract, third-party beneficiary breach of contract, promissory estoppel, fraud, misrepresentation, negligence, joint concerted tortious conduct, and the request for specific performance brought in 2004[8] are time-barred.[9]

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[8] Even if appellant is correct that the statutory period was tolled for his state claims pursuant to 28 U.S.C. § 1367(d), the claims were time barred *before* his federal complaint was filed in 2000.

[9] It appears that the district court was incorrect when it stated that "[t]he United States District Court found that the breach of contract claim arose out of the 1984 flooding and was barred through collateral estoppel and were dismissed with prejudice." This was part of the federal magistrate's report and recommendation. But the Eighth Circuit declined to exercise

(Continued on following page)

Finally, because the legal remedies are barred, appellant is not entitled to the equitable remedies he has requested under the "declaratory judgment" heading. *See Cope*, 331 U.S. at 464, 67 S. Ct. at 1341. And a declaratory judgment merely clarifying the parties' respective rights is unnecessary. The "restrictive covenant" encumbering Outlot C expired by its terms on September 19, 2005. There is no evidence – and appellant has not alleged the existence of any – that he offered to purchase or Trivesco refused to sell Outlot C for $60,000. Highland Properties, general partner of Trivesco, stated in its brief that "[o]bviously, if Appellant[ ] were ever to pay Trivesco the purchase price for Outlot C specified in the Amended Development Agreement and in the 1985 letter agreement, there simply would be no impediment to [his] use of Outlot C to access [his] property."

V.

Without citing any authority, appellant stated in the "legal issues" section of his brief that "[w]hether the [d]istrict [c]ourt erred in denying [appellant's] post-judgment motions" is a question before this court. But appellant omitted this argument from the body of his brief, and it was completely omitted from his reply brief. Assignment of error in a brief based on "mere assertion" and not supported by argument or

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supplemental jurisdiction over appellant's state-law claims. *Johnson*, 360 F.3d at 819.

authority is waived unless prejudicial error is obvious on mere inspection. *Modern Recycling, Inc.*, 558 N.W.2d at 772 (quoting *Schoepke v. Alexander Smith & Sons Carpet Co.*, 290 Minn. 518, 519-20, 187 N.W.2d 133, 135 (1971)). Here, because it is not even clear which post-judgment motions appellant is referring to, it is not obvious that a denial by the district court constituted prejudicial error. Thus, appellant has waived this argument, and we decline to address it.

A final word is, we believe, appropriate. Litigation between appellant and the numerous respondents has been ongoing for over 16 years. Five Minnesota district court judges have ruled on various issues; the federal district court for the State of Minnesota has done so also; this court has issued three appellate opinions, this opinion is the fourth; the Eighth Circuit Court of Appeals has spoken; two petitions for further review have been denied by the Minnesota Supreme Court; one petition for writ of certiorari has been denied by the United States Supreme Court. All issues have been resolved. Although we are not insensitive to appellant's belief that he has not received the relief to which he is entitled, we must disagree. Each of appellant's claims has been resolved. He is not satisfied with the resolution, but the claims are nonetheless resolved. We have considered all of appellant's arguments, including supplemental authorities filed after oral arguments

pursuant to Minn. R. Civ.App. P. 128.05, and found them to be without merit.[10] It is time that this prolonged litigation and the emotional and financial toll it has taken on all involved – appellant and respondents alike – is declared to be at an end.

Affirmed.

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[10] We agree with Shorewood that appellant's supplemental submission exceeded the permissible scope of rule 128.05. We have reviewed the additional authorities, without considering the impermissible arguments, and find that they do not alter our reasoning.

STATE OF MINNESOTA
IN COURT OF APPEALS

Ronald Richard Johnson,

Appellant,

Dee Johnson,

Plaintiff,

vs.

City of Shorewood,

Respondent,

City of Minnetonka,

Respondent,

Riley-Purgatory-Bluff Creek Watershed District,

Respondent,

Trivesco, et al.,

Respondents,

Highland Properties, Inc., et al.,

Respondents,

Steiner and Koppelman, Inc.,

Respondent.

ORDER

A06-2353

(Filed Dec. 6, 2007)

Considered and decided by Hudson, Presiding Judge; Kalitowski, Judge; and Huspeni, Judge.*

BASED ON THE FILE, RECORD, AND PROCEEDINGS, AND BECAUSE:

1. This appeal is scheduled for oral argument on December 12, 2007. The appeal is taken from a judgment entered on October 13, 2006, dismissing appellant's claims.

2. Appellant moves for an order taking judicial notice of letters from the St. Paul District of the Army Corps of Engineers dated February 8, 2007, and March 8, 2007. The letters advise appellant that because appellant has refused to allow the Corps of Engineers access to his property, the Corps has been unable to make an approved final determination on the extent of possible waters of the United States on appellant's property.

3. Appellant argues that this court should take judicial notice of the letters because they establish that the Corps of Engineers has not designated appellant's property as a wetland. Appellant contends that the letters support appellant's claim that certain respondents, including respondent City of Shorewood, the Riley-Purgatory-Bluff Creek Watershed District, and the City of Minnetonka, have improperly taken

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* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

the position that the Corps of Engineers designated the property as a wetland.

4. The City of Shorewood and the City of Minnetonka oppose appellant's motion. The City of Minnetonka filed a responsive motion to strike the document as outside the record.

5. The papers filed in the district court, the exhibits, and the transcript of the proceedings, if any, shall constitute the record on appeal in all cases. Minn. R. Civ. App. P. 110.01. The February 8 and March 8 letters are outside of the record for this appeal.

6. A judicially noticed fact must be one that is not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the district court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Minn. R. Evid. 201(b). While judicial notice may be taken of general matters of common knowledge, it cannot be constitutionally used as a substitute for adjudicating specific facts without a hearing. *In re Block,* 727 N.W.2d 166, 176 (Minn. App. 2007).

7. The position that the Corps of Engineers has taken regarding whether the property at issue is a wetland, and the communications between the Corps and the parties regarding this question over the course of multiple lawsuits, involve specific facts that are not appropriate for judicial notice.

8. An appellate court may not base its decision on matters outside the record on appeal, and may not consider matters not produced and received in evidence below. *Thiele v. Stich,* 425 N.W.2d 580, 582-83 (Minn. 1988). The February 8 and March 8 letters are extra-record documents that are not properly before this, court.

IT IS HEREBY ORDERED:

1. Appellant's motion to take judicial notice is denied.

2. The motion by the City of Minnetonka to strike the extra-record documents is granted.

Dated: Dec. 5, 2007

BY THE COURT

/s/ Natalie E. Hudson
Judge Natalie E. Hudson

STATE OF MINNESOTA — DISTRICT COURT

COUNTY OF HENNEPIN — FOURTH JUDICIAL DISTRICT

Ronald Richard Johnson and Dee L. Johnson,

Plaintiff,

vs.

City of Shorewood; City of Minnetonka; Riley-Purgatory-Bluff Creek Watershed District; Trivesco, a partnership, and its partners; Robert H. Mason, Inc., a corporation; Highland Properties, Inc., a corporation; Steiner and Koppelman, Inc., a corporation; and Highland Villa Builders, Inc., a corporation,

Defendants.

File No. 27-CV-04-16195

ORDER AND MEMORANDUM

(Filed Oct. 11, 2006)

The above-entitled matter came before the Honorable John L. Holahan on July 17, 2006. Erick G. Kaardal, Esq., 33 South Sixth Street, Suite 4100, Minneapolis, MN 55402, appeared on behalf of Plaintiff.

George Hoff, Esq., 775 Prairie Center Drive, 160 Flagship Corporate Center, Eden Prairie, MN 55344, appeared on behalf of Defendant City of Shorewood.

Elisa M. Hatlevig, Esq., 8519 Eagle Point Boulevard, Lake Elmo, MN 55042, appeared an behalf of Defendant City of Minnetonka.

Paul R. Haik, Esq., 225 South Sixth Street, Suite 4320, Minneapolis, MN 55402, appeared on behalf of Defendant Reily-Purgatory-Bluff Creek Watershed District.

Lisa M. Lamm, Esq., 220 South Sixth Street, 1250 Pillsbury Center South, Minneapolis, MN 55402, appeared on behalf of Defendants Trivesco, Steiner and Koppelman.

Christopher S. Hayhoe, Esq., 220 South Sixth Street, Suite 2200, Minneapolis, MN 55402, appeared on behalf of Defendants Highland Properties, Inc., and Highland Villa Builders, Inc.

Based upon the evidence adduced, the argument of counsel and all of the files, records and proceedings herein, IT IS HEREBY ORDERED THAT:

1. Defendant City of Shorewood's Motion for Summary Judgment is GRANTED.

2. Defendant City of Minnetonka's Motion for Summary Judgment is GRANTED.

3. Defendant Riley-Purgatory-Bluff Creek Watershed District's Motion for Summary Judgment is GRANTED.

4. Defendants Trivesco and Steiner and Koppelman's Motion for Summary Judgment is GRANTED.

5. Defendants Highland Properties, Inc.'s and Highland Villa Builders, Inc.'s Motion for Summary Judgment is GRANTED.

6. Plaintiff Johnson's Motion for Partial Summary Judgment is DENIED.

7. Plaintiff's Motion for Declaratory Judgment is DENIED.

8. Defendants' are entitled to their costs and disbursements herein.

9. The attached memorandum is incorporated herein.

10. Service of this Order may be made upon counsel for the parties by U.S. mail which shall constitute good and proper service for all purposes.

11. LET JUDGMENT BE ENTERED ACCORDINGLY

Dated: 10-10, 2006

/s/ John L. Holahan
John L. Holahan
Judge of District Court

MEMORANDUM

In 1981, Plaintiff purchased twenty acres of land in the City of Shorewood (Shorewood). This property was bisected by a drainage ditch that, prior to 1984, eventually emptied into Purgatory Creek to the south of Plaintiff's property. In 1984, Shorewood constructed a road berm in preparation of installing roads and utilities required for development of

"Waterford," a subdivision planned by Trivesco, a commercial developer. Shorewood had obtained consent from the United States Army Corps of Engineers (Corps) for the road and utility installation and all requisite preparatory work, under a Clean Water Act Permit which allowed for the filling in of headwaters wetlands. Plaintiffs contest the 1980 designation by the United States Fish and Wildlife Service that the field on Plaintiffs' property that contained the drainage ditch was a headwaters wetland. The construction done by Shorewood in 1984 raised the bottom of the drainage ditch and subsequent rains created flooding of Plaintiffs' field.

1991 Takings Case[1]

Plaintiffs first brought suit in District Court in 1991 alleging inverse condemnation, claiming that the flooding constituted a regulatory taking, which that court rejected, but the court did find Shorewood to have flooded Plaintiff's property and to have physically taken a permanent drainage easement since December 31, 1984 (1984 flooding) and issued a writ of mandamus compelling Shorewood to commence condemnation proceedings and ordered Shorewood to pay Plaintiffs $33,878.64 as reimbursement

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[1] *Ronald R. Johnson and Dee L. Johnson v. City of Shorewood and the Shorewood City Council, said Council consisting of Mayor Barbara J. Brancel, and Councilpersons Rob Daugherty, Daniel Lewis, Kristi Stover, and Robert Gagne,* District Court File No. 91-18099.

for attorney fees, costs and expenses incurred in bringing this action. Shorewood challenged that determination of the taking as well as the attorney fees award and appealed the state court decision. Judge Montgomery's Order and award was affirmed by the Court of Appeals on May 11, 1994,[2] and review was subsequently denied by the Minnesota Supreme Court on July 14, 1994.[3]

Inverse Condemnation Proceedings

In the condemnation proceedings, Plaintiffs were awarded $2,000 for the physical taking of the drainage easement and $3,000 for costs to repair the damages from the subsequent flooding. The commission also awarded Plaintiffs $500 in reasonable appraisal fees.[4] Plaintiffs were not satisfied with the

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[2] *Johnson v. City of Shorewood, No. CX-93-2452* (Minn.Ct.App. May 11, 1984), *review denied,* (Minn. July 15, 1994).

[3] On July 29, 1994 (only 15 days after the Supreme Court declined review of the matter), the Johnsons moved in District Court to find Defendants in contempt for failure to begin the inverse condemnation proceedings, and to be awarded attorney fees and costs incurred on appeal and for attorney fees and costs incurred in bringing the contempt motion. District Court Judge Oleisky denied the motion in its entirety on September 20, 1994 as premature regarding the contempt claims and found that Plaintiffs were precluded by statute from being awarded attorney fees on appeal. Plaintiffs appealed Judge Oleisky's decision which was affirmed by the Minnesota Court of Appeals on May 16, 1995, Case No. CX-94-2056. On July 2, 1995, the Minnesota Supreme Court denied further review.

[4] District Court Condemnation Case File No. CD-2344.

award and brought a second action in state district, court to challenge the amount of the award and the scope of the taking. In that case, the judge ruled that Plaintiffs were collaterally estopped from relitigating the scope of the taking,[5] but allowed a jury to determine the value of the taking. The jury awarded $63,000 for clean-up costs and $2,000 for the value of the taking. Based on the jury's finding that there had been no diminution in value of the property, the trial court judge vacated the $2,000 award for value as inconsistent with the jury's factual findings. Judge Oleisky awarded Plaintiffs $63,000 together with costs and disbursements. On May 18, 1998, Shorewood paid $116,480.96 to Plaintiffs which included the $63,000 clean-up costs plus interest from January 1, 1985 through May 18, 1998. Plaintiffs were then awarded $67,335.95 for costs incurred in preparation and presentation of their claims at trial.[6] To date, Shorewood has paid Plaintiffs $183, 816.91 in satisfaction of judgments resulting from the inverse condemnation hearings. Both parties appealed the

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[5] On September 25, 1995, District Court Judge Oleisky issued an order finding that the scope of the taking was determined by Judge Montgomery's Court Order in June 1993. Any subsequent objections as to the scope of the physical taking were barred as untimely. District Court File No. CD-2344.

[6] On October 28, 1999, Plaintiffs brought a motion before the District Court for taxation of interests and costs which was denied in part and granted in part by Judge Oleisky. *City of Shorewood v. Ronald Johnson and Dee Johnson, et al.*, District Court File No. CD-2234.

decisions which were later affirmed by the Minnesota Court of Appeals.

1996 Johnson v. Minnetonka Action

In 1996, Plaintiffs brought a second state court action against the City of Minnetonka with allegations that *inter alia*, the development of the Ashcroft subdivision, which lay completely within Minnetonka city limits, had been diverting storm-water run-off onto Plaintiffs' property starting as early as 1992. This action was dismissed without prejudice for Plaintiffs' failure to join necessary parties. Plaintiffs did not appeal this dismissal. Instead, in 2000, Plaintiffs filed a third suit against all parties in the current action plus, the United States Government, and the Corps in U. S. District Court alleging constitutional violations stemming from the alleged takings in 1984 occurring from Shorewood's construction of the ditch dam and also alleged continued takings occurring when Shorewood allegedly buried fiber optic cables and also constructed a walking path and temporarily installed fence along the eastern edge of Plaintiffs' property.

2000 United States. District Court[7]

In this first federal case (but third overall suit by Plaintiffs), Plaintiffs re-asserted the original takings issues associated with the 1984 flooding and asserted that the construction of the trail and fencing along with the buried fiber optic cables constituted new and uncompensated for takings. The federal complaint also alleged violations of the Freedom of Information Act (FOIA), conspiracy between the Defendants to prevent Plaintiffs from being compensated for the alleged takings, breach of contract, promissory estoppel, fraud, misrepresentation, negligence and inverse condemnation to sum up a few of the principal twenty-five counts in the complaint.

The Magistrate's Report and Recommendation found that collateral estoppel applied to claims arising out of the 1984 flooding and that the federal claims were not supported by any actionable facts. The Report also found that there was no evidence of

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[7] *Ronald Richard Johnson and Dee Lundberg Johnson v. City of Shorewood; City of Minnetonka; Riley-Purgatory-Bluff Creek Watershed District; Trivesco, a partnership, and its partners; Robert H. Mason, Inc., a corporation; Highland Properties, Inc., a corporation; Steiner and Koppelman, Inc., a corporation; Highland Villa Builders, a corporation; the United States; the Corps of Engineers of the United States; the Secretary of the United States Army in his/her official capacity, Honorable Louis Calders or his successor; and the Commander-in-Chief of the Corps of Engineers of the United States in his/her official capacity, Lt. General Joseph N. Ballard or his successor,* United States District Court, District of Minnesota, Case No. 00-CV-1281.

conspiracy against the Johnsons nor was there evidence offered of violations of federal due process or federal equal protection standards. On May 18, 2001, United States Magistrate Judge Susan Nelson dismissed all claims arising out of the 1984 flooding with prejudice as barred by the doctrine of collateral estoppel. The remaining state claims against Trivesco and RPBCWD were dismissed without prejudice due to a lack of jurisdiction in the federal court for the state claims that had yet to be heard in a Minnesota state court.

Upon appeal by Plaintiffs, Magistrate Nelson's ruling was reviewed *de novo* by United States District Court Judge Donovan Frank and affirmed in all respects and adopted by the court. All claims arising from prior state litigations were dismissed with prejudice and any unripe or supplemental claims were dismissed without prejudice. All federal defendants' motions for summary judgment were granted based on either lack of jurisdiction or on the applicable statute of limitations.

The Order affirming the Magistrate's Report was then appealed to the United States Court of Appeals for the Eighth Circuit on August 10, 2001 (one day after filing the below suit in the Court of Federal Claims). On March 5, 2004, the Court of Appeals issued an Opinion which affirmed the lower court's ruling with an expanded analysis as to some of the claims. In reference to claims against the federal government, the Court of Appeals emphasized the lack of the pleadings to properly address review of

agency actions or violations of constitutional protections. The Court reviewed supplemental affidavits in considering the conspiracy charges and affirmed that Plaintiffs have not met their burden in producing facts that would show there was an understanding or agreement between any of the Defendants to violate Plaintiffs' rights.

The Court of Appeals found the state claims unripe for federal jurisdiction as Plaintiffs have failed to pursue proper state remedies for post-deprivation issues and fraud allegations against governmental actors. Claims not yet advanced in state proceedings were dismissed without prejudice and Plaintiffs motion to file a third amended complaint was denied. With the above modifications, the Court of Appeals affirmed the lower courts rulings.

On October 4, 2004, the Supreme Court denied certiorari.

2001 Court of Federal Claims

On August 9, 2001, Plaintiffs filed their fourth suit in the Court of Federal Claims alleging both physical and regulatory takings arising from the 1984 flooding. The claim also alleged tort claims against the Corps and other government actors for breaking and failing to enforce laws. Plaintiffs also alleged a breach of implied and/or express contracts connected to the United States Fish and Wildlife Service's 1980 designation of the Johnson property as wetland.

The court found the physical takings claims relating to the 1984 flooding to be barred by the applicable statute of limitations and that Plaintiffs were effectively on notice as of 1984 due to the open and notorious nature of the pond construction and its effects, or at the very latest on inquiry notice in 1991 when Plaintiffs commenced action in state court against Shorewood for claims arising from the 1984 flooding. The court then found that the regulatory takings claims against government actors failed to state a claim upon which relief could be granted. Designation of property as wetland in itself does not constitute a taking, instead, it is a subsequent denial such that would prevent an economically viable use of the designated land that would constitute a taking. Plaintiffs have not been denied a permit by the Corps or other government actors therefore the court found there had been no regulatory taking. Additionally, the court mentioned in dicta that Plaintiffs had purchased their property subsequent to the wetland designation of the property.

The claims based in tort were dismissed for lack of proper jurisdiction in the federal courts. The court also found that the claims based on breach of contract failed to state a claim for which relief could be granted. Plaintiffs failed to produce any written agreements or documentary evidence to support these claims and thus failed to show that there was any contract. The court allowed Plaintiffs additional time to perfect the breach of contract allegations and present supporting evidence.

2004 District Court Action[8]

On November 3, 2004, Plaintiff filed their fifth lawsuit asserting the same allegations asserted in the Complaint filed in 2000 in the United States District Court. This suit is now before this Court. The title of the federal complaint was changed to eliminate federal defendants, but the body of the Complaint has remained the same. Plaintiffs claim that in their March 5, 2004 ruling, the Court of Appeals referred the state claims back to state court, including the 28 U.S.C. §§ 1983 and 1985 taking claims. Plaintiff also asserts that all claims are tolled under 28 U.S.C. § 1367(d). All above named Defendants have individually moved for summary judgment based on res judicata and collateral estoppel *inter alia,* in light of all previous litigation between the parties.

In Counts I through V of the Complaint, Plaintiffs allege that there has been permanent and temporary, regulatory and physical takings of their property due to the alleged construction of a fence, a walking trail, and installation of fiber optic cable along the edge of their property that borders Vine Hill Road. The Complaint also alleges in these Counts

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[8] *Ronald Richard Johnson and Dee L. Johnson v. City of Shorewood City of Minnetonka; Riley-Purgatory-Bluff Creek Watershed District; Trivesco, a partnership, and its partners; Robert H. Mason, Inc., a corporation; Highland Properties, Inc., a corporation; Steiner and Koppelman, Inc., a corporation, and; Highland Villa Builders, a corporation,* District Court File No. 27-CV-04-16195.

that flooding due to the installation of a road berm in 1984 has affected a taking of the flooded property. Plaintiffs claim they remain uncompensated for the alleged takings as well as the previously adjudicated physical taking of the drainage easement, and have brought this suit in state court alleging that all above named defendants have either together or individually worked to devalue their property purposefully and with animus so that the various defendants could profit from the lowered valuation of Plaintiffs' property.

In Counts V, VIII and X-XIV, Plaintiffs assert various claims regarding Outlot C. All claims pertaining to Outlot C arise out of alleged 'secret' covenants restricting use of the property and relate to the 1984 flooding. Plaintiffs fail to assert any facts in support of the allegations that there existed any agreements between Defendants pertaining to restrictive covenants on the property and this Court finds that all restrictive covenants on said property were publicly recorded as of the 1985 Declaration and Plaintiffs were put on actual notice when they performed a records search in 1988.

In Counts VI-IX, Plaintiffs assert various constitutional claims arising out of the 1984 flooding as well as the new allegations of physical takings. Plaintiffs' due process and equal protection claims as to the federal defendants have been fully litigated and found insufficient to support a claim against Federal Defendants. Plaintiffs do not offer any new evidence to support such claims against state or private actors

in this action, instead relying solely on assertions made in the original Complaint filed in Federal District Court in 2000.

In Counts XI-XVI, Plaintiffs make various breach of contract claims relating to maters [sic] arising out of the 1984 flooding and the alleged 2000 takings. In Count XX, Plaintiff also alleges a tort claim against defendants for tortuous interference with the alleged contractual relationships between the parties. Plaintiffs fail to offer any new evidence or assert any new facts to support the existence of implied or express contracts with any of the Defendants relating to these allegations.

In Counts XVII-XIX, Plaintiffs make various fraud and negligence claims relating to the 1984 flooding and the alleged 2000 takings. Plaintiffs fail to offer any new evidence or assert any new facts to support the existence of agreements between Defendants or existence of animus on the part of the Defendants toward Plaintiffs.

In Count XXI, Plaintiffs assert a violation of the Freedom of Information Act in that the Corps and other Defendants did not provide information upon request and intentionally destroyed documents that had been requested. Plaintiffs have offered no new evidence or asserted new facts to support these claims.

In Count XXII, Plaintiffs allege that all above assertions have created a devaluation of their property and that this devaluation has slandered the title

to such property, Plaintiffs have offered no new evidence or asserted new facts to support this claim,

In Count XXIII, Plaintiffs request this Court to compel inverse condemnation proceedings in relation to all alleged takings Plaintiffs claim to be uncompensated for. Plaintiffs have offered no new evidence or asserted new facts to support this type of action, nor have Plaintiffs sought a writ of mandamus to compel such proceedings.

In Count XXIV, Plaintiffs move to have this Court preserve a right to amend the pleadings. Plaintiffs have offered no new evidence or asserted facts that would support a judicial grant for an amended pleading.

ANALYSIS

SUMMARY JUDGMENT

Rule 56.03 of the Minnesota Rules of Civil Procedure sets forth the standard for a summary judgment motion:

> Judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to judgment as a matter of law.

When considering a summary judgment motion, the Court must view the evidence in the light most favorable to the nonmoving party. *See Dempsey v. Jaroscak*, 290 Minn. 405, 188 N.W.2d 779, 781-82 (1971). It is well-established that if there is an insufficient showing of evidence on an essential element of the nonmoving party's claim, the claim fails. *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986). But once the moving party has made and supported their summary judgment motion, the burden shifts to the nonmoving party to show specific material facts supporting a triable issue essential to the material elements of their case. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997). Although the court views the evidence in a light most favorable to the non-moving party, *W.J.L. v. Bugge*, 573 N.W.2d 677, 680 (Minn. 1998), the non-moving party must do more than rest on mere averments or some creation of metaphysical doubt. *DLH*, 566 N.W.2d at 71.

Res Judicata & Collateral Estoppel

Res judicata applies when claims that were, or could have been, litigated in a prior action and bars re-litigation as to those claims. *Klinefelter v. Krum and Forster Ins. Co.,* 675 N.W.2d 330, 335 (Minn. Ct. App. 2004). A court will apply the doctrine of res judicata to claims before it when (i) there has been a final judgment on the merits; (ii) the same cause of action is involved; (iii) the parties are identical or in privity; and (iv) the estopped party has had a full and fair opportunity to litigate the matter. *Brown-Wilbert,*

Inc. v. Copeland Buhl & Co., P.L.L.P., 715 N.W.2d 484, 488 (Minn. Ct. App. 2006). Res judicata acts as an absolute bar to claims that have previously been fully litigated so that there is a finality to the previous judgment and that a party is not "twice vexed for the same cause." *Id.* at 487-88.

Collateral estoppel applies much the same standard as for res judicata but has the additional requirement that the issue litigated as opposed to the claim asserted, be identical to the issue in the prior adjudication. *Hauschildt v. Beckingham,* 668 N.W.2d 916, 918 (Minn. Ct. App. 2003). Therefore, collateral estoppel applies to bar "re-litigation of a right, question, or fact distinctly put in issue and directly determined on a prior adjudication." *Id.* at 919.

Statute of Limitations

Plaintiff has failed to establish any facts that point to a tolling of the applicable statutes of limitations in the above matters. This Court agrees with all prior decisions by the various courts listed above that there has been no tolling of the statute of limitations under 28 U.S.C. § 1367(d) and all claims arising out of the 1984 flooding are outside the statute of limitations and Plaintiff cannot claim a tolling of the applicable statutes. Plaintiffs' assertion that Minn. Stat. § 541.02 applies to toll the statute of limitations on their claims relating to Outlot C is misplaced. There have been no claims of adverse possession asserted

and § 541.02 applies to adverse possession and is not applicable in this matter.

Declaratory Relief

Two principal considerations the court must consider when evaluating whether a declaratory judgment is an appropriate remedy are: (i) whether the judgment will serve a useful purpose in clarifying and settling legal relations; and (ii) whether the judgment will terminate and afford relief from uncertainty, insecurity and controversy. Although declaratory relief may be available in all types of actions, it is within the court's discretion to grant or deny a declaratory judgment. Minn.Stat.Ann. § 555.06.

REGULATORY AND
PHYSICAL TAKINGS CLAIMS

Plaintiffs claims [sic] that they remains [sic] uncompensated for various multiple takings of his property resulting from actions taken by Shorewood and in Count I of the Complaint, ask for declaratory relief from this Court to determine all possible property rights violations that have occurred in the past and to establish and protect any remaining property rights that Plaintiffs may have in the future. In Count X, Plaintiffs ask for declaratory relief in the form of a provision to construct a road across Outlot C allowing for additional access to Plaintiffs' property. This Court finds that all property claims arising out of the 1984 ditch damn [sic] and subsequent flooding

have been fully adjudicated on the merits and, under the doctrine of res judicata, summary judgment is proper as to those claims. As to the remaining claims, this Court finds the claims to be unsupported and without merit and proper for summary judgment (see discussion below). Where the court issues summary judgment, there is no longer a legal relationship or controversy that needs clarification and a declaratory judgment is not an appropriate remedy. This court does not find it necessary to enter a declaratory judgment in the above matters.

Claims arising out of the 1984 flooding are barred by the doctrines of collateral estoppel, res judicata and applicable statutes of limitations.

This Court finds that all takings claims arising out of the 1984 flooding due to the installation of the road berm by Shorewood have been fully and fairly litigated to a final resolution as evidenced by state and federal actions discussed above. Plaintiff has not offered any new claims or issues regarding the takings claims against the parties except for the few new allegations discussed immediately below. The parties to this litigation are all parties that have been involved in the previous litigations on these identical issues. Additionally, when evaluating the applicable statutes of limitations, all previously litigated claims arising out of the 1984 flooding are barred as outside of the statute. Since Plaintiffs have not offered anything new regarding the 1984 flooding claims that

has not been litigated previously, all claims arising out of the 1984 flooding are thus barred by the doctrines of res judicata, collateral estoppel and the applicable statute limitations and will not be considered by this court.

Facts asserted regarding alleged takings in June 2000 are insufficient to support a claim.

The new alleged takings claims asserted by Plaintiffs are: (i) construction of a 'fence' along the Vine Hill Road side of Plaintiffs' property; (ii) construction of a walking trail; and (iii) the installation of fiber optic cable along Plaintiffs' property line. The 'fence' that Plaintiffs claim to have been constructed along their property was a silt fence installed to help prevent erosion during a construction project and was immediately removed upon Plaintiff's request that it be removed. Plaintiffs have not established that there was a taking of any property due to the temporary placement of the silt fence. The walking trail that Plaintiff referenced was never constructed and without construction of a trail, there has been no taking of any property for a city walking trail and thus no loss to Plaintiffs. Any preparatory actions taken by Shorewood were upon a public dedication and were never completed. Neither the placement of the silt fence or the preparatory work on a public trail rise to the level of an actionable taking, therefore Shorewood's motion for summary judgment as to this issue will be granted as a matter of law.

As to the installation of fiber optic cable along Plaintiffs' property line, it is undisputed between the parties that Shorewood is not responsible for the installation of the fiber optic cable, nor did Shorewood issue a permit for it to be placed on the Johnson property. The above named Defendants are not liable for the installation of the fiber optic cable, thus the claim that there has been a taking due to the installation of that cable will be dismissed and summary judgment in favor of Defendants will be granted in that matter.

Plaintiff has received full compensation for the physical taking of an easement by Shorewood.

Plaintiffs claim to be uncompensated for the physical takings due to flooding and all regulatory taking connected with that flooding. Plaintiffs have received payment from the judgment against Shorewood in the Condemnation hearings, which Shorewood has offered evidence to show payment in the form of checks made payable to Plaintiffs which satisfy all due judgment amounts. Plaintiffs do not remain uncompensated for those takings and have in total received $183,816.91 from Shorewood in satisfaction of judgments in Plaintiffs' favor. This Court finds Plaintiffs to have been fully compensated for all judgments entered in Plaintiffs' favor in connection with the condemnation proceedings arising out of the physical taking of the drainage easement.

INVERSE COMDEMNATION CLAIM

Since this Court has found that there have been no new takings, there is no need to exercise an inverse condemnation hearing. A party is entitled to assert an inverse condemnation claim through a writ of mandamus. Such a writ will not be issued unless the party asserting the claim has shown they have suffered a direct or substantial harm. *Alevizon v. Metropolitan Airports Commission of Minneapolis and St. Paul*, 298 Minn. 471, 485, 216 N.W.2d 651, 661 (1974). Plaintiffs have not shown they have suffered direct or substantial harm resulting from the temporary placement of a fence (which was removed immediately upon Plaintiffs' request), nor from the walking trail that was never physically constructed. Plaintiffs have failed to show that Shorewood is liable for the installation of the fiber optic cable, and even if liability was shown, Plaintiffs fail to establish they have suffered any harm from the installation of the fiber optic cable. The facts asserted in this Complaint do not rise to a level of proof of harm that would support this Court issuing a writ to compel an inverse condemnation hearing.

BREACH OF CONTRACT CLAIMS

In Counts X through XV, Plaintiff makes various claims regarding alleged implied and express contracts between Plaintiffs and Defendants. In the 2000 United States District Court and the 2001 Court of Claims actions, Plaintiffs made the identical breach

of contract claims. The United States District Court found that the breach of contract claim arose out of the 1984 flooding and was barred through collateral estoppel and were dismissed with prejudice. The Court of Federal Claims found that Plaintiffs did not assert enough facts to establish an actionable claim and allowed Plaintiffs additional time to perfect their breach of contract allegations. This Court finds that in addition to Plaintiffs continued failure to assert any additional facts to support the existence of express or implied contracts, the dismissal with prejudice by the United States District Court is controlling. Plaintiff has failed to establish that there were any implied or express contracts between the parties and without a showing of the existence of a contract, there is no breach shown on the part of the Defendants in this case. Plaintiffs' breach of contract claims fail for this reason.

In Count XVI, Plaintiff is requesting specific performance on those alleged contracts. Without a showing of the existence of any form of contract, Plaintiffs' motion for specific performance of those alleged contracts must also fail. The fence Plaintiffs complain about has already been removed, and the walking trail was never constructed. As to the fiber optic cable, Shorewood is not liable for the installation of or permitting for such installation of the cable and therefore cannot be compelled to remove such cable. Plaintiff has failed to establish that he and Shorewood ever entered into an agreement that would support such a remedy.

FRAUD CLAIMS

The fraud claims asserted in Count XVII of this Complaint have been previously addressed in the 2000 United States District Court action. In that case, Magistrate Nelson found that in addition to the claims arising out of the 1984 flooding were barred by collateral estoppel, Plaintiffs had offered no evidence that would show the existence of a conspiracy between Defendants to violate any of Plaintiffs' rights. Plaintiff [sic] has failed to offer any additional evidence to show that Defendants conspired against the Johnsons, but instead made the decision to rely on allegations in the previous Complaint. Without offering any evidence sufficient to support a finding of conspiracy, this Court finds that Plaintiffs' claims of conspiracy do not survive Defendants motions for summary judgment.

This lack of evidence pointing toward any conspiracy between Defendants in this case to deprive Plaintiffs of federally protected rights, under color or law or otherwise, works to eliminate any cause of action under 42 U.S.C. §§ 1985 or 1983. Both sections require a showing of a deprivation of a federally protected right in order to be actionable and Plaintiff has failed to make such a showing. All claims arising out of the 1984 flooding are barred by collateral estoppel or the applicable statute of limitations. Claims arising out of the alleged 200 [sic] takings are unsupported by the facts as discussed above. Plaintiff fails to establish a conspiracy between Defendants to deprive him of a federally protected right and thus

has no cause of action under 42 U.S.C. §§ 1985 or 1983.

NEGLIGENCE CLAIMS & TORT CLAIMS

As discussed above, Plaintiff has failed to establish the existence of any implied or express contracts between the parties. The claims in Counts XVIII-XX either stem from the 1984 flooding and are barred by collateral estoppel or are based on unsupported claims of takings in 2000. Plaintiffs fail to provide evidence or assert additional facts that would support a claim of negligence or misrepresentation by the Defendants. The allegations in Counts XVIII-XX arise from the 1984 flooding of the Johnson's property and all claims arising out of that incident are barred by collateral estoppel and have either been fully litigated or are barred by the applicable statute of limitations as discussed by the United States District Court in 2001.

FREEDOM OF INFORMATION ACT CLAIM

Plaintiffs Freedom of Information Act (FOIA) claims were brought in federal court and dismissed as barred by the applicable statute of limitations. These claims arise from the 1984 flooding and the applicable statute of limitations began to run at that time or at the very latest by 1991 when the initial lawsuit on these issues was brought in state court. Plaintiff has failed to assert any additional facts that would support a FOIA. violation. The allegations in Count XXI

arise out of the 1984 flooding of the Johnson's property and all claims arising out of that incident are barred by collateral estoppel and have either been fully litigated or are barred by the applicable statute of limitations as discussed by the United States District Court in 2001.

SLANDER OF TITLE CLAIM

Plaintiff has failed to assert any additional facts that would support a claim of slander of title. The allegation in Count XXII arises out of the 1984 flooding of the Johnson's property and all claims arising out of that incident are barred by collateral estoppel and have either been fully litigated or are barred by the applicable statute of limitations as discussed by the United States District Court in 2001.

PRESERVATION OF RIGHT
TO AMEND PLEADINGS

Plaintiff fails to assert a basis upon which this Court would grant the motion to preserve the right to amend the pleadings. Plaintiff has had ample opportunity to perfect the pleadings over the years that these claims have been litigated in various courts, both at the state and the federal level. Under Rule 15.04 of the Minnesota Rules of Civil Procedure, a court may permit a party to serve a supplemental pleading that sets forth transactions, occurrences or events that have happened since the date of the initial pleading. There is nothing in the Rules of Civil

Procedure that provides for the 'preservation' of a right to amend the pleadings. A party who wishes to amend the pleadings must make a motion to the court The date of the initial pleading in this matter is November 2nd, 2004. None of the parties have asserted facts or occurrences that have happened since that date, therefore this Court will not grant Plaintiff's motion to amend the pleadings.

CONCLUSION

Plaintiffs have had a full and fair opportunity to litigate all issues arising out of the 1984 flooding and have failed to produce sufficient facts to support a taking claim regarding incidents occurring in 2000. For the reasons cited herein, Summary Judgment is granted in favor of all Defendants and such Defendants will be granted their costs and disbursements incurred in this matter. Plaintiffs' Motion for Partial Summary Judgment and Requests for Declaratory Judgments are denied.

J.L.H.

STATE OF MINNESOTA

IN SUPREME COURT

A06-2353

Ronald Richard Johnson,

Petitioner,

Dee Johnson,

Plaintiff,

vs.

City of Shorewood,

Respondent,

City of Minnetonka,

Respondent,

Riley-Purgatory-Bluff Creek Watershed District,

Respondent,

Trivesco, et al.,

Respondents,

Highland Villa Builders, Inc.,

Respondent.

ORDER

(Filed Apr. 29, 2008)

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that the petition of Ronald Richard Johnson for further review be, and the same is, denied.

Dated: April 29, 2008

BY THE COURT:

/s/ Russell A. Anderson
Russell A. Anderson
Chief Justice

DIETZEN, J., took no part in the consideration or decision of this case.

A06-2353

STATE OF MINNESOTA
IN COURT OF APPEALS

Ronald and Dee Johnson,

Appellants,

vs.

City of Shorewood; City of Minnetonka; Riley-Purgatory-Bluff Creek Watershed District; Trivesco, a partnership; and its Partners; Robert H. Mason, Inc., a corporation; Highland Properties, Inc., a corporation; Steiner and Koppelman, Inc., a corporation; and Highland Villa Builders, Inc., a corporation,

Respondents

REPLY MEMORANDUM TO RESPONDENTS' OPPOSITION TO APPELLANTS RONALD AND DEE JOHNSONS' REQUEST FOR JUDICIAL NOTICE OF FEDERAL AGENCY COMMUNICATIONS

Shorewood[1] has been consistent since the start of the Johnsons' first action against the city for the

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[1] References to "Shorewood" encompass the City of Shorewood, the Watershed District and the City of Minnetonka. To date, only Shorewood and Minnetonka have responded to the Johnsons' motion on judicial notice.

unconstitutional taking of their property by a ditch dam constructed over twenty-two years ago. Shorewood has consistently declared (without evidence) that the Johnsons' property was a pre-taking wetland and, then, represented to the various courts that the United States Corps of Engineers *determined* the city's pre-taking wetland representation as true because the Corps had *determined* a pre-taking federal Clean Water Act wetland.[2] But, it is not true.

The issue, therefore, is Shorewood's conduct. When, if ever, was Shorewood to inform the court of the accurate and true position of the Corps? Failure to make the disclosure is a fraud on the court. However, the appellants' legal claims do not depend on proving fraud on the court, but rather that the continued position of Shorewood, in light of the Corps' contradictory position, has resulted in the deprivation of Johnsons' constitutional and statutory guarantees[3] to just compensation for Shorewood's continual governmental taking of their property.

The principal legal issue before the Court of Appeals, under these facts and circumstances, is the failure of the lower court to accurately determine the Johnsons' claims for declaratory judgment, inverse condemnation and 42 U.S.C. § 1983 claims.

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[2] Appellants Br. at p. 8, Johnson App. pp. 181-199; 236-266; Dahlberg Aff. 5th, ¶ 8.

[3] Minn. Stat. § 117.

Shorewood does not dispute the Johnsons' position on the source of the Corps' communication dated February 8 and March 8, 2007. Thus, the Johnsons meet the second alternative prong of Minn. R. Evid. 201(b): "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Shorewood does argue however, that "while judicial or official notice may be taken of general matters of common knowledge, it cannot be constitutionally used as a substitute for adjudicating specific facts without a hearing."[4] There is no need and the Johnsons do not seek this Court to adjudicate specific facts or engage in fact-finding.

The February and March Corps' letters simply crystallize the facts of the consistent position of the Corps regarding *determinations* of the existence of pre-taking wetlands on the Johnsons' property – that the Corps has never done so. That it isolates and clarifies Shorewood's previous and continued misrepresentation or mistaken representations to the court about the existence of pre-taking wetlands is unsettling only to Shorewood because of what it represents – the city's rationale *not to provide just compensation* to the Johnsons despite guarantees provided in Minn. Stat. § 117 and the Just Compensation Clauses in the United States and Minnesota Constitutions.

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[4] *In re Block*, 727 N.W.2d 166, 176 (Minn. App. 2007).

Adjudicated facts reflect Shorewood making representations to the Court since 1996[5] of the Corps having determined the existence of pre-taking wetlands on the Johnsons' property. Shorewood's position has been consistent and consistently contradicted by the Corps. Nonetheless, Shorewood has continued to marry the Corps to a position it has not made and cannot make. No further hearing is necessary on these adjudicated facts.

The central issue of the Johnsons' appeal is the inaccurate lower court decision on Johnsons' claims under Minnesota's Declaratory Judgment Act, Minn. Stat. § 117 and under 42 U.S.C. § 1983. Shorewood's opposition to the Corps' 2007 letters merely reflect its greatest fear – Shorewood's pre-taking wetland position since 1996 and the resulting "zero" compensation for the taking of the Johnsons' property, cannot be carried forward for continued takings without compensation in light of Minn. Stat. § 117 and the Just Compensation Clauses of the United States and Minnesota Constitutions.

The Court of Appeals should grant the Johnsons' motion for judicial notice, regarding the February 8, 2007 and Match 8, 2007 letters of the United States Army Corps of Engineers.

---

[5] *Id.*

Dated: April 6, 2007.

MOHRMAN & KAARDAL, P.A.

/s/ Erick G. Kaardal

Erick G. Kaardal,
Attorney No. 229647
33 South Sixth Street,
Suite 4100
Minneapolis, MN 55402-3601
Telephone: (612) 341-1074

Attorney for Appellants
Ronald and Dee Johnson

A06-2353

STATE OF MINNESOTA
IN COURT OF APPEALS

Ronald and Dee Johnson,

Appellants,

vs.

City of Shorewood; City of Minnetonka; Riley-Purgatory-Bluff Creek Watershed District; Trivesco, a partnership; and its Partners; Robert H. Mason, Inc., a corporation; Highland Properties, Inc., a corporation; Steiner and Koppelman, Inc., a corporation; and Highland Villa Builders, Inc., a corporation,

Respondents

MOTION OF APPELLANTS RONALD AND DEE JOHNSON RE: REQUEST FOR JUDICIAL NOTICE OF AGENCY COMMUNICATIONS

The Appellants Ronald and Dee Johnson move this Court under Minn. R. App. P. 127 to take judicial notice of the Department of the Army, Corps of Engineers communications dated February 8, 2007 and March 8, 2007 and attached hereto as Attachments A and B. The communications are evidence of federal agency statutory interpretations relating to Shorewood's previous statements in District Court proceedings, *City* [sic] *Shorewood v. Johnson*, Case No. CD-2344 (1996), affirmed by the Minnesota Court of

Appeals, *City of Shorewood v. Johnson*, No. C5-97-1525, 1998 WL 188561 (Minn. App. 1998) that the U.S. Corps of Engineers had determined a pre-takings wetlands under the federal Clean Water Act, 33 U.S.C. § 1344, on the Johnsons' property.

The Appellants provided the District Court with a detailed review of Shorewood's statements that the Corps had determined a pre-taking Clean Water Act wetland on the Johnsons' property in Plaintiffs' Memorandum of Law in Support of Motion for Partial Summary Judgment at 12-19. For example, Shorewood's expert Ronald P. Peterson testified on October 22, 1996 before the District Court jury that determined the Johnsons' just compensation award:

> Q. OK. Now, as I understand your testimony, you think that – you will agree that if the Johnson property was not – was not a wetland before the taking and is now a wetland, you would agree that the Johnsons have sustained damage, would you not?
>
> A. Yes.
>
> Q. OK. We'll write damage (indicating) pre-taking, wetland – Oh, no. Wetland and after wetland. Under those circumstances, you would agree that Mr. Johnson – that the Johnsons have sustained damage. Correct?
>
> A. Correct
>
> * * *

Q. You're aware that the Corps of Engineers has not asserted jurisdiction over this property, are you not?

A. They most certainly have.

* * *

Q. And what language in those letters specifically leads you to believe that the Corps believed that Johnsons' property was a wetland.

A. Well, there are three letters. One is February [sic] 7, 1994, one is from March 2nd, 1993, one is from March 17th, 1993.

* * *

Q. Is it your testimony that all of this area was and is wetland?

A. Yes.

City [sic] *Shorewood v. Johnson*, Case No. CD-2344, Trial Transcript 10-22-96 (Appellants' Appendix at 188-199). The fact that Shorewood has represented to the District Court and this Court that the Corps determined a pre-taking Clean Water Act wetland should not really now be in dispute.

However, one issue in dispute before the District Court at the July 27, 2006 hearing before District Court John L. Holahan – although not addressed in the District Court opinion – was whether Shorewood's representations in the previous District Court and Court of Appeals proceedings that the Corps had

determined a pre-taking Clean Water Act wetland on the Johnsons' land was true?

The attached Corps' correspondence dated February 8, 2007 and March 8, 2007 show that what Shorewood represented in the prior District Court and Court of Appeals proceedings was not true. The Corps' correspondence shows that the Corps never determined pre-taking Clean Water Act wetlands on the Johnsons' property. The Corps' communications support the Johnsons' claims of fraudulent or mistaken representations to the Court against Shorewood.

Under Rule 201(f) of the Minnesota Rules of Evidence, there is no distinguishing between taking judicial notice on appeal and taking judicial notice in the trial court: "Judicial notice may be taken at any stage of the proceeding." Although the scope of the rule under Rule 201(a) indicates a narrow interpretation governing "only judicial notice of adjudicative facts in civil cases," the rules allow judicial notice of material not subject to reasonable dispute. As Rule 201(b) states:

> A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

Courts generally defer to an agency's interpretation of its own regulations.[1] After the adjudication of Johnsons' district court action and the District Court's refusal to allow a Minn. R. Civ. P. 60 motion, the Corps further affirmed its previous admission – an admission ignored by the District Court – that the Corps had not declared any of Johnsons' property as pre-taking Clean Water Act wetlands. For instance, evidence before the lower court regarding the Corps' admission is found in correspondence dated July 8, 2002, of "indicators" of wetlands – but not ground truth evidence:

> The new ditch and the apparent discharge sites for the dredged material are in areas mapped as wetland on the National Wetland Inventory and the Metro Wetland Inventory maps. The Hennepin County Soil Survey identifies this part of the site as "Marsh." As stated in our previous correspondence, *these sources are only indicators that wetlands may exist.*"[2]

The Corps is the federal agency responsible for the enforcement of regulations governing the waters of the United States subject to Section 404 of the Clean Water Act. The Corps interprets its own regulations. Under 33 C.F.R. Part 328.3(a), the Corps is responsible for all impoundments of waters of the

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[1] *See, e.g.*, Minn. Ctr. For Envtl. Advocacy v. Minn. Pollution Control Agency, 644 N.W.2d 457, 465 (Minn. 2002).

[2] Affidavit of Erick G. Kaardal, Ex. 14.

United States and these impoundments are considered waters of the United States subject to regulatory jurisdiction.[3] This would also include man-induced impoundments.[4]

The Corps in a written communication to Appellant Ronald Johnson, stated emphatically that "[o]ver the last 14 years, we have explained many times that you may need a permit to discharge dredged or fill materials in parts of your property that are wetland, *but that most of your property may not be wetland.*[5] Thus, the Corps has never declared a pre-taking Clean Water Act on the Johnsons' property.

The statement "never declared" is not an exaggeration or misrepresentation of fact. In a Corps communication with Johnson on March 8, 2007 the agency further affirms its position on the wetland determinations on the Johnsons' property: "[Y]ou had *never been told either there was or was not* '33 U.S.C. § 1344, Section 404 federal jurisdiction wetland *prior to* construction of the 'road/dam.'"[6]

The function of judicial notice is to expedite litigation and not cause further delay in proving matters of fact that are demonstrable by resort to

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[3] Corps correspondence dated February 8, 2007, Att. A (emphasis added).

[4] *Id.*

[5] *Id.* at p. 2.

[6] Corps correspondence dated March 8, 2007, Att. B (emphasis added).

"unquestionable sources of information."[7] The Corps is an unquestionable source of information. Its position has been consistent since July 2002. Nevertheless, Shorewood and other Respondents have consistently asserted the existence of a Corps' determination of a pre-taking Clean Water Act wetland on the Johnsons' property, thereby avoiding governmental responsibilities embodied in the United States and Minnesota Constitutions governing takings and compensation. Nevertheless, the skillfulness of the Respondents to deflect the truth exhibited through the Corps' interpretation of its own regulations should not be an impediment to the Johnsons' constitutional and statutory rights. Likewise, the court should not be frustrated to deny the Johnsons' relief otherwise unattainable through continued misrepresentations to the Court.

Therefore, Appellants Ronald and Dee Johnson ask the Court of Appeals to take judicial notice of the Department of Army, Corps of Engineers letters dated February 8, 2007 and Marcy [sic] 8, 2007.

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[7] *State Department of Highways v. Halvorson*, 288 Minn. 424, 430,181 N.W.2d 473, 477 (Minn. 1970).

Dated: March 26, 2007.

/s/ Erick G. Kaardal
MOHRMAN & KAARDAL, P.A.
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No. 229647
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Minneapolis, MN 55402-3601
Telephone: (612) 341-1074

Attorney for Appellants

DEPARTMENT OF THE ARMY
ST. PAUL DISTRICT, CORPS OF ENGINEERS
ARMY CORPS OF ENGINEERS CENTRE
190 FIFTH STREET EAST
ST. PAUL, MN 55101-1638
8 March 2007

[LOGO] REPLY TO
ATTENTION OF

Mr. Ron Johnson
5355 Shady Hills circle
Shorewood, MN 55331

SUBJECT: Responses to letters dated 23DEC06, 29DEC06, 11JAN07, 13JAN07, 16JAN07, 17JAN07 and 16FEB07 to our office

Dear Mr. Johnson:

This is in response to your December 23, 2006, December 29, 2006, January 11, 2007, January 13, 2007, January 16, 2007, January 17, 2007 and February 16, 2007 letters to me.

Your December 23, 2006 letter made two requests of me. The first request was for a copy of Mr. Yanta's e-mail to Mr. Brown the second was that a 2005 enforcement action notice that you believe was sent to the EPA by Mr. Yanta be retracted. Enclosed, as per your request, is a copy of Mr. Yanta's e-mail to Mr. Brown and Mr. Brown's reply. (Enclosure 1) I note that those e-mails were not sent to you in conjunction with your October 2006 FOIA request (See Enclosure 2) because that request was limited to the 2005-2006 time-frame and those e-mails were written and sent in 2002 and was not sent to you in response to your

December 15 request because that request (See Enclosure 3) specifically excluded documents previously provided and the e-mails were previously provided to you in August of 2002. With respect to your request that a 2005 enforcement action notice to EPA be retracted, I take this opportunity to inform you that neither the District nor Mr. Yanta has sent an enforcement action notice involving your property to the EPA. Therefore, a response to your requests which were predicated on the existence of an enforcement referral to EPA (2a through 2f), would be superfluous. Your subject line referenced "current Administrative Procedures Act (APA) claims", however, I am not aware of any current claims of yours that involve the District or the Corps.

You requested, in your December 29, 2006 letter, that I address your prior APA claims. The only prior claims of yours against the Corps, that I am aware of, is the litigation that you filed in the U.S. District Court in Minnesota and in the Court of Federal Claims. On July 11, 2001 the District Court dismissed your FOIA claims with prejudice and your takings claim without prejudice. That decision was affirmed by the 8th Circuit Court of Appeals and certiorari was denied by the Supreme Court of the United States on October 4, 2004. On August 10, 2001 you filed an action in the Court of Federal Claims. On April 5, 2004, the Court of Federal Claims dismissed the case in its entirety and this was affirmed by the Court of Appeals for the Federal Circuit on June 24, 2005. Neither I, Mr. Adamski, nor Ms. Cangemi is aware of

any APA claim from you that has not already been resolved through litigation. Further, we are unaware of any letter from Mr. Kaardal that asserted such a claim. I am aware of a letter from Mr. Kaardal to Ms. Cangemi dated February 16, 2001 (See Enclosure 4) that purports to be a "second presentation of claims"; however, that letter is insufficient to constitute a claim (APA or Tort). Generally, I also note that APA claims are asserted in court, not by a letter to an agency. However, if you are referring to a different letter from Mr. Kaardal, if you would send me a copy of that letter, I will review it and let you know if a claim has been asserted and if any further action is warranted.

With respect to your January 11, 2007 letter and your statement "Pursuant to my Administrative Procedures Act claims", as previously stated, I am not aware of any extant claim, APA or otherwise, from you. If you are aware of a current APA claim please advise me when and where the claim was filed and provide me a copy of the claim so that I may fully respond. You also indicated that you had enclosed information from the city of Shorewood that demonstrated Mr. Yanta had trespassed on your property when he took some photographs of your property. I have reviewed that information and am of the opinion that, that information does not demonstrate a trespass occurred. Further, you stated that "Largely because of the Corps' phony "wetland" assertions expert Nagell estimated the damages as of November

10, 2006 at $3,726,000". This statement is contradicted by your enclosed report of Nagell Appraisal and Consulting. Nagell's report noted "It is my opinion the actions by the City of Shorewood as described in the report *will* have an adverse effect on the marketability or value of the remainder". Finally, you state "As you are aware Mr. Yanta (mis)represented in letters to me that my land had Section 404 wetland and these letters were used by Shorewood to deprive me such compensation". I am not aware of any misrepresentation by Mr. Yanta. I am, however, aware that Mr. Yanta has informed you that without a physical inspection of the property he could not tell if it contains wetlands and that he has requested permission to enter your land to make such a determination.

You assert, in your January 13, 2007 letter that "Since these documents go to my current claims served on you recently". However, such a claim has never been served on me. Your letter also referred to "my APA claims sounding in tort". APA claims do not sound in tort. Further, I am not aware of any tort claim against the Corps from you. Please provide us a copy of any unresolved claim(s) that you assert has previously been submitted so that we may take appropriate action. You also requested additional "photos and documents dated on or about June 25, 2002 which are missing from her January 8, 2007 for your response". These photos were sent to you under separate cover. However, I should note that these photos were not sent to you pursuant to your

December 14, 2006 request because they were not encompassed by that request and that your statement that the "hydvan" was parked near "where Mr. Yanta's people excavated ground water hydrology percolation pits that day in my subject farmland without my consent damaging it" is incorrect. Neither Mr. Yanta nor his "people" (Mr. Yanta does not have any people nor did he direct anyone to excavate pits on your land) excavated any hydrology percolation pits or other pits on your land. You also requested that I consider Mr. Kaardal's "APA/tort demands and his amended Federal complaint of 2001" as "part of my administrative claims here". As explained previously, the 2001 complaint that was filed in the Court of Federal Claims was dismissed by the Court of Federal Claims in April of 2004 and that dismissal was affirmed by the Court of Appeals for the Federal Circuit in June of 2005. That matter is resolved; you are not entitled to the [sic] relitigate that complaint and I will not consider that complaint further. Moreover, to my knowledge, you do not have a current complaint. If you think that you have a current complaint, please provide me a copy of the documents that asserted such complaint and I will review them. (The fact that I am willing to review such documents should not be construed as an indication that those documents, if any, are sufficient to assert a complaint or, if sufficient, that the complaint is timely or has merit.) You also stated that "these documents go to my current claims served on you recently". I have not been served with any claim from you. If you think that I have received such service please provide me a

copy of such document and documentation that may indicate service was accomplished.

Your letter of January 16, 2007, stated that "I wish to make clear my December 23, 2006 letter also, constituted a FOIA appeal on your December 21 2006 production." We will treat your January 16, 2007 letter as an appeal and will process it accordingly. The December 23, 2006 letter did not "constitute a FOIA appeal" and, in fact, does not even contain the word "appeal".

Your January 17, 2007 letter contained your "proposed draft of your agency's *permanent no-jurisdiction determination* for the subject property to reach settlement of all claims" and a request that we send our draft determination and release papers to Mr. Kaardal. You do not have any active claims with the agency. Thus, there are no claims to settle. Further, as you have been repeatedly and consistently informed, the District, absent your permission to enter your land, can not and will not make a jurisdictional determination. Therefore, I suggest, that if you truly want a jurisdictional determination that you allow entry onto your land.

Your February 16, 2007 letter requested that I send you the appropriate forms to "file my *current* claims against your client". I again inform you that, to my knowledge, you do not have any "*current* claims against" my client. I have, however, included a copy of an administrative tort claim form should you wish to file a tort claim. (Enclosure 5) Please do not consider

my inclusion of the tort claim form an indication that any such claim, if filed, would be timely or, if timely, would have merit. APA claims are filed directly with the Court. Further, I should remind you that I am not your attorney and, if you are seeking legal advice, you must seek it elsewhere. You asked whether my "client still insists that it determined my property . . . had 33 U.S.C. § 1344, Section 404 federal jurisdiction wetland prior to construction of the 'road/dam'". I spoke with Mr. Whiting and he stated that you had never been told either there was or was not "33 U.S.C. § 1344, Section 404 federal jurisdiction wetland prior to construction of the 'road/dam'". You also stated that Mr. Whiting's January 11 letter stated that there was wetland adjacent to your ditch and that a determination of whether wetlands exist on your property would require a site visit. It appears you have misinterpreted Mr. Whiting's letter. Mr. Whiting's letter, read in context, informed you that if there were any unauthorized drainage improvements the ditch maintenance exemption would not apply to any adjacent wetlands that may be present.

Sincerely,

Enclosures

/s/ Edwin C. Bankston
Edwin C. Bankston
District Counsel

[SEAL]

DEPARTMENT OF THE ARMY
St. Paul District Corps of Engineers
190 Fifth Street, East, Suite 401
St. Paul, Minnesota 55101-1638

FEB 08 2007

REPLY TO ATTENTION OF

Operations
Regulatory (2005-486-JJY/1993-2124-JJY)

Mr. Ron Johnson
5355 Shady Hills Circle
Shorewood, Minnesota 55331

Dear Mr. Johnson:

We have received your letter dated January 13, 2007.

According to Corps of Engineers regulations (33 CFR Part 328.3(a), enclosed), *all* impoundments of waters of the United States are waters of the United States, subject to Section 404 of the Clean Water Act. As noted in the 1987 Wetland Delineation Manual sections on atypical, man-induced wetlands (enclosed) and in 33 CFR 328.5 (enclosed), man-induced impoundments can be determined to be wetlands or waters of the United States.

Because existing exemptions (see 33 CFR 323, enclosed) do not cover incidental wetland created by a permitted impoundment, we cannot exempt such an area from Section 404 jurisdiction.

If the impoundment involved an unauthorized activity or a permit violation, we might be able to

take enforcement action against the violator and require restoration of the area to previous conditions. However, in this case, the impoundment of the ditched waterway that flows out of your property was authorized administratively by a nonreporting 1982 nationwide general permit that had no areal [sic] limits on fill or on other impacts (such as inundation or drainage) in headwaters areas (see the 1982 version of 33 CFR 330.4, enclosed). This nationwide general permit also expressly allowed impoundments to be authorized (see the 1982 version of 33 CFR 330.6, enclosed). Despite your repeated claims that the City of Shorewood and the private developers have violated this permit, we cannot identify any violation of the conditions of this permit and therefore cannot take any enforcement action.

We note that you filed suit in both State and Federal courts regarding the road/dam that created the impoundment. No court has ordered removal of the road/dam. Consequently, we must consider the road/dam as part of the existing normal circumstances, as defined by Regulatory Guidance Letters 82-02 and 86-09 (enclosed). If we were to make an approved final determination on this site, we would use this guidance and the Wetland Delineation Manual.

To do work in the ditched waterway and any wetland areas that may be adjacent to it may require a permit from the Corps of Engineers, unless the work falls under one of the existing exemptions. Some types of work involving discharges of dredged material or fill may be authorized under existing general permits.

If the work requires a more detailed review, we would consider site-specific information during permit reviews, as we have explained repeatedly. We first explained this position in our February 7, 1994, letter (enclosed), which answered questions raised in the October 19, 1993, memo that you reference (enclosed).

Over the last 14 years, we have explained many times that you may need a permit to discharge dredged or fill material in parts of your property that are wetland, but that most of your property may be nonwetland. We have offered to delineate any wetlands or other waters on your property, without charge. You have refused to allow us on the site. Consequently, we have been unable to make an approved final determination on the extent of possible waters of the United States on your property.

We have also explained repeatedly that, if you need to do regulated work in wetlands or the waterway, we would consider the information you have provided (and other pertinent information) during our review of any permit application. In 1996, we approved work you proposed. That authorization has expired, and you have not applied for a new permit.

If you want to discuss these jurisdictional issues or to apply for a permit that may solve your problems, you may call me at (651) 290-5376. As we have stated repeatedly, it may be more productive for us to discuss your situation and try to reach a solution than for you to continue sending letters that ask the same

questions, which forces us to continue providing the same responses.

I will try to break this cycle by offering a new project manager to work with you, if you wish to work in a new direction on resolving your issue. However, I must have Mr. Yanta continue to be involved in any information requests concerning the period in which he was the project manager because he is most familiar with the file. Please contact me if you are interested in resolution of this issue.

Sincerely,

/s/ Robert J. Whiting
Robert J. Whiting
Chief, Regulatory Branch

Enclosures

Engineering • Planning • Surveying

MFRA
McCombs Frank Roos Associates, Inc.

January 25, 2006

Mr. Erick G. Kaardal
Mohrman & Kaardal, P.A.
Multifood Tower
33 South 6th Street, Suite 4100
Minneapolis, Minnesota 55402

SUBJECT: Ron Johnson Property
5400 Block of Vine Hill Road
Shorewood, Minnesota
Drainage Ditch Investigation
MFRA #10428

Dear. Mr. Kaardal:

In 1995 McCombs Frank Roos Associates, Inc. (MFRA) completed a field survey of the subject drainage ditch and located its original dimensions (depth and width) as excavated in the mid-1950's in a pre-existing natural drainageway. During the 1995 investigation, MFRA noted substantial alterations to the ditch downstream on the adjacent property, which is owned by the City of Shorewood and is designated as Waterford Outlet A. The largest (36" drop inlet) outlet control structure of the stormwater pond on Waterford Outlot A was set at the 914 feet MSL, which is near the top of the ditch bank at the "tractor" culvert located near the midpoint of the ditch on the subject property. MFRA noted that one

result of the alterations (berm and placement of the ditch water level control structure) was that silt and debris would deposit within the ditch due to the loss of flow velocity and to public storm sewer discharges to the ditch. Consequently, the deposition of sediments would seriously impair the scope and effect of the ditch to lower the subsurface ground water table as obviously intended when the ditch was constructed. MFRA concluded the ditch construction effectively removed any wetland hydrology from the adjacent upland areas of the subject property. Attached for your reference are the November 28, 1995 and November 19, 1996 MFRA ditch investigation reports and the 1967 City (OSM) topography map and a 1998 topography map prepared by WSB, which illustrate the ditch before and after the alterations.

During the 1995 investigation, MFRA located the "tractor" culvert crossing located approximately at the midpoint length of that portion of the ditch on the subject property. At that time the culvert invert was located at 910 feet MSL and was clear and operating to the limited maximum extent possible with the ditch alterations in Waterford Outlot A. Land alongside the ditch at the culvert crossing was located at an elevation of 914.7 feet MSL and it was noted the culvert inside diameter is 36 inches. Please refer to the 1995 MFRA ditch profile drawings.

On December 8, 2005 MFRA completed a site visit to observe the current condition of the "tractor" culvert and associated drainage ditch. MFRA observed a substantial amount of sediment deposited downstream

of the "tractor" culvert. This deposition is what was expected with the alterations made to the ditch in Waterford Outlot A. MFRA probed the ditch bottom in the area of the sediment deposition and observed approximately 36 inches of a muck/silt sediment at a location approximately 12 feet downstream of the current crossing and the ditch is almost entirely silted up at its outlet to Waterford Outlot A. Furthermore, the observation of open water at the area of sediment deposition indicates that the flow velocity is higher because of the build up of sediment. Portions of the drainage ditch on either side of the sediment build up were frozen due to the reduced velocity. Photos of the culvert and down stream conditions were taken during the site visit and are attached.

As MFRA predicted in 1995, sediment deposition has caused the culvert to be almost entirely submerged and the ditch function seriously further impaired. As MFRA also noted in 1995, prior to the ditch alterations the ditch had sufficient gradient to largely self-scour to free itself of sediment. The alteration of the ditch on City property (Waterford Outlot A) was intended to permanently impound water at elevation 910 feet MSL providing zero upstream ditch gradient to the culvert. This along with frequent flood events and off-site public storm water discharges to the site has caused water to frequently pond at the 914-foot or higher elevation and subsequently caused sediments to deposit within the portion of the drainage ditch on Johnson's property which is basically an extension of the Waterford Outlot A pond.

In MFRA's professional opinion, based on its 1995 and 2005 site visits, major ditch maintenance should be performed at least every five (5) years because of the altered outlet and public storm water discharges to the ditch, whereas prior to the Waterford Outlot A alterations major maintenance could be expected every 25 years or more. Previous MFRA studies determined 1) that the drainage ditch was man-made in the mid-1950's, 2) the dimensions of the original drainage ditch, and 3) that under pre-existing conditions (prior to the City's stormwater pond) the drainage ditch effectively drained the soils in the adjacent upland areas. Based on these conclusions, Mr. Johnson should be allowed to have the ditch maintained to its original dimensions.

Per Mr. Johnson's request, a copy of this letter has been submitted to the individuals listed below.

Please feel free to contact me at (763) 476-6010 if you have any questions regarding this letter.

Sincerely,

MFRA

/s/ Todd Ullom
Todd Ullom
Wetland/Soil Scientist

cc: Ron Johnson
Larry Brown, City Engineer
Steve Gurney, City Contract Engineer,
WSB & Associates, Inc.
Bob Obermeyer, Riley Purgatory Bluff Creek
Watershed District Engineer

Joe Yanta, U.S. Army Corps of Engineers
Dale Homuth, MN DNR

List of Figures and Attachments
MFRA Report – November 28, 1995
MFRA Survey Data (3 sheets) – 1995
MFRA Report – November 19, 1996
City (OSM) Topography Map – 1967
City (WSB) Topography Map – 1998
Photo Log – December 8, 2005

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 02-3562

Ronald Richard Johnson; Dee Lundberg Johnson,

Plaintiffs/Appellants,

v.

City of Shorewood, Minnesota; City of Minnetonka, Minnesota, and its Mayor in her official capacity; Riley-Purgatory-Bluff Creek Watershed District, and the Chair of its Board of Managers in his official capacity; Trivesco, a partnership, and its partners; Robert H. Mason, Inc., a corporation; Highland Properties, Inc., a corporation; Steiner & Koppelman, Inc., a corporation; Highland Villa Builders Inc., a corporation; United States of America; Corps of Engineers, being sued as the Corps of Engineers of the United States; Louis Caldera, The Honorable, Secretary of the United States Army in his/her official capacity or his successor; Joseph N. Ballard, Lt. General, the Commander-in-Chief of the Corps of Engineers of the United States in his/her official capacity,

Defendants/Appellees.

Appeals from the United States District Court for the District of Minnesota.

No. 02-4081

Ronald Richard Johnson; Dee Lundberg Johnson,

Plaintiffs/Appellees,

v.

City of Shorewood, Minnesota;

Defendant/Appellant,

City of Minnetonka, Minnesota, and its Mayor in her official capacity; Riley-Purgatory-Bluff Creek Watershed District, and the Chair of its Board of Managers in his official capacity; Trivesco, a partnership, and its partners; Robert H. Mason, Inc., a corporation; Steiner & Koppelman, Inc., a corporation; United States of America; Corps of Engineers, being sued as the Corps of Engineers of the United States; Louis Caldera, The Honorable, Secretary of the United States Army in his/her official capacity or his successor; Joseph N. Ballard, Lt. General, the Commander-in-Chief of the Corps of Engineers of the United States in his/her official capacity; Highland Properties, Inc., a corporation; Highland Villa Builders, Inc., a corporation,

Defendants/Appellees.

No. 03-2023

Ronald Richard Johnson; Dee Lundberg Johnson, Plaintiffs/Appellants, v. City of Shorewood, Minnesota; and its Mayor in her official capacity; City of Minnetonka, Minnesota, and its Mayor in her official capacity; Riley-Purgatory-Bluff Creek Watershed District, and the Chair of its Board of Managers in his official capacity; Trivesco, a partnership, and its partners; Robert H. Mason, Inc., a corporation; Highland Properties, Inc., a corporation; Steiner & Koppelman, Inc., a corporation; Highland Villa Builders Inc., a corporation; United States of America; Corps of Engineers, being sued as the Corps of Engineers of the United States; The Honorable Louis Caldera, Secretary of the United States Army in his/her official capacity or his successor; Lt. General Joseph N. Ballard, the Commander-in-Chief of the Corps of Engineers of the United States in his/her official capacity, Defendants/Appellees.	*	Appeals from the United States District Court for the District of Minnesota.

Submitted: December 18, 2003
Filed: March 5, 2004

Before LOKEN, Chief Judge, WOLLMAN, and HANSEN, Circuit Judges.

WOLLMAN, Circuit Judge.

This appeal represents the continuation of Ronald and Dee Johnson's multi-year litigation over a 20-acre parcel of land they own in Hennepin County, Minnesota. After pursuing several state court actions during the 1990s, the Johnsons brought this suit in federal court against the cities of Shorewood and Minnetonka, Minnesota, the Riley-Purgatory-Bluff Creek Watershed District (Watershed District), various private real estate developers,[1] and the United States of America (acting through the Army Corps of Engineers and certain Army officials). The Johnsons assert a multitude of federal and state claims, but their primary allegation is that the appellees have, individually and in concert, effected various regulatory and physical takings of their property and conspired to prevent them from receiving just compensation. Adopting a series of reports and recommendations by

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[1] Trivesco (a partnership); Robert H. Mason Homes, Inc.; Highland Properties, Inc.; and Steiner & Koppelman, Inc.

a magistrate judge,[2] the district court[3] dismissed the claims against the United States for want of subject matter jurisdiction and on statute of limitations grounds, granted summary judgment to the remaining defendants, and declined to exercise supplemental jurisdiction over the pendent state law claims.[4] The Johnsons appeal each of these decisions, as well as certain discovery rulings and the decision denying them leave to submit a third amended complaint. Shorewood cross-appeals, arguing that the district court should have found certain claims barred by res judicata. We affirm in all respects, albeit on slightly different grounds with respect to some of the claims.

I.

The subject property, which the Johnsons purchased in 1981, is located within the city of Shorewood. It consists of three wooded knolls separated by a flat, centrally located field. The field is diagonally bisected by a drainage ditch running from the northeast corner to the southwest corner. Before 1984,

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[2] The Honorable Susan Richard Nelson, United States Magistrate Judge for the District of Minnesota.

[3] The Honorable Donovan W. Frank, United States District Judge for the District of Minnesota.

[4] After summary judgment had been entered, the district court allowed Johnson to submit two affidavits that had not been made part of the summary judgment record. After reviewing the affidavits, the district court concluded that it was not necessary to vacate the prior orders.

water ran through the ditch and headed south from the Johnson property, ultimately emptying into Purgatory Creek. In 1980, prior to the Johnsons' purchase, the field was designated as a wetland on the National Wetland Inventory Map issued by the United States Fish and Wildlife Service.[5]

After the Johnsons purchased the property, Trivesco began developing land to the south and west. Dubbed "Waterford," the resulting subdivision required the installation of roads and utilities. In 1984, Shorewood obtained the consent of the United States Army Corps of Engineers to install the roads and utilities under an existing Clean Water Act Permit that authorized the filling of "headwaters wetlands." The Watershed District issued permits for the work.

Shorewood constructed a road berm, culvert, and pond-control structure along the southern boundary of the Johnson property. The pond-control structure raised the bottom of the drainage ditch above its original elevation and created a pond near the southern boundary of the Johnson property. Based on the design of the pond-control structure, the Watershed District designated a 100-year storm event flood plain at an elevation of 917.1 feet above sea level and prohibited construction at elevations lower than 919.1 feet. *Johnson v. City of Shorewood,* No. 91-18099, at 4 (Minn. Dist. Ct., Aug. 17, 1993, Findings

[5] The Johnsons contest the validity of this designation.

of Fact, Conclusions of Law, and Order For Judgment).

The Johnsons commenced state court litigation against Shorewood in 1991, alleging inverse condemnation under both the federal and Minnesota constitutions. The state court determined that the flood plain restrictions did not constitute a regulatory taking, but concluded that the pond and associated control structure had physically taken the Johnsons' property up to 914 feet above sea level because the pond would rise to that elevation during "major storm events." *Id.* at 5. Accordingly, the state court issued a writ of mandamus compelling Shorewood to commence condemnation proceedings for the purpose of acquiring a drainage easement on the Johnsons' property up to 914 feet above sea level. *Id.* The Minnesota Court of Appeals affirmed this judgment. *Johnson v. City of Shorewood,* No. CX-93-2452 (Minn. Ct. App. May 11, 1994), *review denied,* (Minn. July 15, 1994).

Shorewood instituted condemnation proceedings and awarded the Johnsons $2,000 for the easement and $3,000 for "cost to cure" damages. Not satisfied with the award, the Johnsons brought a second state court action, this one challenging the scope of the taking and the amount of the award. The state court held that the Johnsons were collaterally estopped

from re-litigating the scope of the taking[6] and submitted the valuation issue to a jury. The jury awarded the Johnsons $2,000 for the taking and $63,000 for clean-up costs. The state court vacated the $2,000 takings award, however, in light of the jury's finding that the taking had not diminished the market value of the Johnsons' land. Although both parties appealed, the Johnsons did not contest the amount of the award. The Minnesota Court of Appeals affirmed the judgment, holding that the $63,000 award was appropriate because the value of the Johnsons' property would have been diminished absent clean-up of debris caused by the flooding. *City of Shorewood v. Johnson,* No. C5-97-1525, 1998 WL 188561, at * 1 (Minn. Ct. App. April 21, 1998).

In 1996, the Johnsons brought suit against the city of Minnetonka, alleging that development of the Aschcroft subdivision in Minnetonka had been

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[6] In the first action, the Johnsons challenged certain conditions that Shorewood had placed on the plat approval of Johnson property, and although the record does not precisely disclose what was argued at the first trial, the second state court found as follows: "[B]ecause the issue concerning the pre-ownership wetland designation relating to the Property, and the issue concerning the City's conditions for plat approval, were already adjudicated [in the first state proceeding] . . . upon a motion for summary judgment, the doctrine of collateral estoppel clearly precludes the introduction of evidence or argument [to the] . . . contrary." *City of Shorewood v. Johnson*, No. CD-2344, at 5 (Minn. Dist. Ct., Oct. 10, 1996, Memorandum and Order).

diverting storm water on to the Johnsons's property since as early as 1992. The state court dismissed the action without prejudice for failure to join necessary parties. The Johnsons did not appeal from the dismissal, electing instead to file the federal district court action giving rise to the present appeal.

The Johnsons's second amended complaint spans fifty-five pages and includes twenty-three counts. It alleges numerous constitutional violations stemming from regulatory and physical takings of the Johnson property from at least 1984 to the present,[7] and alleges a conspiracy to accomplish the takings and to prevent the Johnsons from receiving compensation. The complaint also alleges a violation by the United States of the Freedom of Information Act (FOIA) and includes a battery of pendent state law claims for, *inter alia,* breach of contract, promissory estoppel, fraud, misrepresentation, negligence, and inverse condemnation.

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[7] For example, shortly after the Johnsons filed their initial complaint, Shorewood allegedly extended a public fence and walking trail onto the eastern boundary of the Johnsons's property and buried fiber optic cables parallel with the adjacent road. The Johnsons' second amended complaint identifies this action as an uncompensated taking.

II.

A. Claims Against The United States

The district court concluded that it lacked subject matter jurisdiction over the Johnsons's takings claims against the United States. Having reviewed the dismissal de novo, *Lemonds v. St. Louis County,* 222 F.3d 488, 492 (8th Cir. 2000), we agree. The United States Court of Federal Claims has exclusive subject matter jurisdiction over takings claims against the United States that exceed $10,000 in amount. *See* 28 U.S.C. §§ 1346(a)(2), 1491(a)(1); *Eastern Enterprises v. Apfel,* 524 U.S. 498, 520 (1998); *Mullally v. United States,* 95 F.3d 12, 14 (8th Cir. 1996). The Johnsons clearly sought damages in excess of $10,000, and they have in fact filed takings claims against the United States in the Court of Federal Claims.

Nevertheless, the Johnsons suggest that dismissal of their takings claims violates their right to a jury trial under the Seventh Amendment. This argument fails, however, because parties are not entitled to a jury trial in most actions against the United States, *see* 28 U.S.C. § 2402, a limitation that derives from the sovereign power of the United States to limit when and how it may be sued. *See United States v. Sherwood,* 312 U.S. 584, 587 (1941); *United States v. Kearns,* 177 F.3d 706, 709 (8th Cir. 1999).

The district court also granted summary judgment on the Johnsons' FOIA claim on the ground that it was barred by the applicable statute of limitations. The Johnsons assert on appeal that the United States

is estopped from asserting the statute of limitations defense because it "fraudulently" stated that it had destroyed certain documents when in fact it had not. This contention was not raised in the district court, however, and so we will not consider it on appeal. *Orion Financial Corp. v. American Foods Group, Inc.*, 281 F.3d 733, 740 (8th Cir. 2002).

In any event, the claim would be moot because we could not grant the relief the Johnsons seek. *Cf. Doe v. Pulaski County Special School Dist.*, 306 F.3d 616, 621 (8th Cir. 2002) (en banc) ("[A]n appeal must be dismissed as moot when our decision will have no 'effectual relief whatever to a prevailing party.'" (citation omitted)). The Johnsons do not argue that the United States should release any particular information or documents under FOIA, but instead suggest that the FOIA violation would have led to discovery of evidence that would have allowed them to recover just compensation in the state court proceedings. They claim that they can therefore assert "tort claims" against the United States. FOIA, however, is a comprehensive scheme that provides for injunctive relief only, not tort liability or damages, *see* 5 U.S.C. § 552(a)(4)(B) (delineating the powers of the district court on proof of a FOIA violation), and thus the Johnsons could not recover tort damages based on a FOIA violation. *See Johnson v. Executive Office for U.S. Attorneys*, 310 F.3d 771, 777 (D.C. Cir. 2002).

In a related vein, counsel for the Johnsons suggested at oral argument that the Johnsons still possess viable claims against the United States under

the Administrative Procedure Act (APA), 5 U.S.C. §§ 701 *et seq.*, and for a "per se constitutional tort" because unidentified federal agents "misrepresented" that the Johnsons' property was a federal wetland in the state litigation and thereby diminished the jury's valuation judgment. Putting aside the question of the validity of these theories of recovery, they do not appear in the governing pleadings and were never properly raised before the district court, and so we will not consider them. The second amended complaint is devoid of references to the APA, does not request review of any final agency action, fails to mention *Bivens v. Six Unknown Named Agents,* 403 U.S. 388 (1971), and does not specify constitutional violations by federal officials that are distinct from the takings claims over which the district court lacked jurisdiction.[8]

B. Claims Against The Remaining Defendants

In adopting the magistrate judge's recommendations, the district court found that the Johnsons had not produced evidence of a conspiracy sufficient to

[8] The Johnsons have repeatedly raised new issues throughout the course of this litigation. They never pleaded the alleged violations of environmental laws that appear in the statement of issues in the opening paragraphs of their brief, nor the allegations of First Amendment violations. The same is true of the alleged trespasses and property damage committed by the federal defendants during the summer of 2002, and the additional FOIA violations mentioned in the Johnsons' reply brief.

survive summary judgment on their claim under 42 U.S.C. § 1985. The court also granted summary judgment on the Johnsons' claims under 42 U.S.C. § 1983, adopting the magistrate judge's reasoning that those claims "were either fully litigated in the earlier state court proceedings or are not ripe because they have not been presented to the state court." Magistrate Judge's Recommendation of May 3, 2001, at 5. Having reviewed the grant of summary judgment de novo, applying the same standard as that applied by the district court, *Evergreen Investments, LLC v. FCL Graphics, Inc.*, 334 F.3d 750, 753 (8th Cir. 2003), we conclude that the district court did not err in granting summary judgment.

A successful claim under 42 U.S.C. § 1985 requires evidence of a conspiracy to deprive a plaintiff of civil rights. *See Jensen v. Henderson*, 315 F.3d 854, 862 (8th Cir. 2002). On summary judgment, then, it was the Johnsons' burden to advance some "facts which would suggest that appellees reached an understanding to violate [the Johnsons'] rights." *Id. (citing Larson v. Miller*, 76 F.3d 1446, 1454 (8th Cir. 1996)). From our review of the voluminous record,[9] including an affidavit by the former mayor of Shorewood, we agree that the Johnsons failed in this endeavor. The record and the Johnsons' appellate briefs are replete with speculation regarding a

[9] We have considered the affidavits that were originally omitted from the summary judgment record.

conspiracy, *see e.g., Marquez v. Bridgestone/Firestone, Inc.*, 353 F.3d 1037, 1038 (8th Cir. 2004) (per curiam), but nowhere do the Johnsons point to specific facts tending to show an illicit agreement among the defendants. It is not a court's obligation to search the record for specific facts that might support a litigant's claim, *see Crossley v. Georgia-Pacific Corp.*, No. 03-2320, 2004 WL 99022, at *1 (8th Cir. Jan.22, 2004) (per curiam), and we are not disposed to undertake such a task in this case.

At most, the Johnsons' evidence suggests that the United States, the Watershed District, the municipal defendants, and the private developers worked together on various development projects and communicated with each other, but this alone is insufficient to generate a genuine issue of material fact regarding the existence of a conspiracy. This lack of evidence also dooms for want of state action the Johnsons' federal claims against the private developers under 42 U.S.C. § 1983. *See Johnson v. Outboard Marine Corp.*, 172 F.3d 531, 536 (8th Cir. 1999). As for the 42 U.S.C. § 1983 claims against Shorewood, Minnetonka, and the Watershed District, we agree that "the record does not show the existence of any potential constitutional violation . . . other than the alleged taking of the Johnsons' property without just compensation." Magistrate Judge's Recommendation of May 3, 2001, at 5 n 2.

The United States Supreme Court has ruled that takings claims are not ripe for adjudication in federal court unless and until they have been exhausted in

state administrative and judicial proceedings. *See Williamson County Reg'l Planning Comm. v. Hamilton Bank,* 473 U.S. 172, 195 (1985) (*Williamson County*) (concluding that a property owner "has not suffered a violation of the Just Compensation Clause until the owner has unsuccessfully attempted to obtain just compensation through the procedures provided by the State for obtaining such compensation."). Moreover, federal courts give full faith and credit to state court judgments, *see* 28 U.S.C. § 1738; *Mitra v. Warren City Sch. Dist. Bd. Of Educ.,* 465 U.S. 75, 81 (1984), and a state judgment on the merits is binding absent a grant of certiorari from the United States Supreme Court or the existence of a statute providing for federal review of the state decision. *See, e.g.,* 28 U.S.C. § 2254.

Finally, because the United States Supreme Court alone has jurisdiction to review state court decisions, the lower federal courts lack subject matter jurisdiction to consider federal claims that would vitiate an underlying state court judgment. *Lemonds,* 222 F.3d at 492; *see also District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462, 483 (1983); *Rooker v. Fidelity Trust Co.,* 263 U.S. 413, 416 (1923). With the limited exception of habeas corpus actions, this principle, known as the *Rooker-Feldman* doctrine, applies whenever a federal claim would succeed only "to the extent that the state court wrongly decided the issues before it." *Simes v. Huckabee,* 354 F.3d 823, 827 (8th Cir. 2004) (*quoting Pennzoil Co. v. Texaco, Inc.,* 481 U.S. 1, 25 (1987) (Marshall, J., concurring)).

Unlike collateral estoppel, the *Rooker-Feldman* doctrine does not necessarily depend upon an identity of parties or claims between the state and federal litigation, and because the doctrine is jurisdictional, it may be raised sua sponte. *Lemonds,* 222 F.3d at 492-93.

Many of the Johnsons' claims call upon us to consider issues identical to those on which the Johnsons have already obtained a state court decision, especially as against Shorewood. Although the district court mentioned our decision in *Lemonds,* it disposed of claims actually litigated in the state court cases under principles of collateral estoppel. We believe the problem is more fundamental. To the extent the Johnsons' alleged constitutional injury stems from claims adjudicated in the prior state court judgment, the district court lacked jurisdiction under *Rooker-Feldman* because the Johnsons are essentially challenging the state judgment as inadequate and are "asking the federal court for the same remedy requested in the state court action: just compensation." *Gisslen v. City of Crystal,* 345 F.3d 624, 628 (8th Cir. 2003), *petition for cert. filed,* No. 03-1141 (Feb. 4, 2004). Moreover, the claims may be unripe under *Williamson County* because the Johnsons failed to appeal the sufficiency of the state court jury award.

The Johnsons argue that they were denied just compensation due to "misrepresentations" perpetrated in the state court proceedings – misrepresentations which they allegedly discovered after the fact. Whatever the validity of these allegations, *Rooker-Feldman*

stands as a bar to federal review because the Johnsons' requested relief "would effectively reverse the state court decision or void its ruling." *Bechtold v. City of Rosemount,* 104 F.3d 1062, 1065 (8th Cir. 1997). The Johnsons' remedy, if any, is to return to state court and utilize its procedures for remedying fraud. *See Johnson v. Smithsonian Institution,* 189 F.3d 180, 186-87 (2d Cir. 1999). If the state courts deny relief, the Johnsons may seek review by the United States Supreme Court.

The Johnsons' claims that were not adjudicated in state proceedings suffer a similar fate, although for a different reason. Although claims not presented or adjudicated in state proceedings may not be not barred by *Rooker-Feldman, Williamson County* still applies. Thus, all of the claims which the Johnsons failed to present in the state litigation, as well as all of the claims which arose after the state court fixed the takings issues to be decided, are unripe for adjudication in federal court because the Johnsons have failed to pursue state postdeprivation remedies for those alleged takings. *See Kottschade v. City of Rochester,* 319 F.3d 1038, 1042 (8th Cir.), *cert. denied,* 124 S. Ct. 178 (2003).

C. Dismissal of State Law Claims

Because the court granted dismissal or summary judgment on all of the Johnsons' federal claims, it declined to exercise jurisdiction over the Johnsons' supplemental state law claims, dismissing them

without prejudice. A federal district court has the discretionary power to decline jurisdiction where it has "dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c)(3). The Supreme Court has noted that "in the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine . . . will point toward declining to exercise jurisdiction over the remaining state-law claims." *Carnegie-Mellon Univ. v. Cohill,* 484 U.S. 343, 350 n. 7 (1988). That is precisely the case here, and we find no abuse of discretion in the district court's decision to dismiss the pendent claims. *See Innovative Home Health Care, Inc. v. P.T.-O.T. Assoc.,* 141 F.3d 1284, 1287 (8th Cir. 1998); *McLaurin v. Prater,* 30 F.3d 982, 985 (8th Cir. 1994).[10]

D. Shorewood's Cross-Appeal

Shorewood's cross-appeal contends that many of the Johnsons' current claims could have been brought during the state court proceedings described above. Shorewood suggests that not only does collateral estoppel bar consideration of claims actually litigated, res judicata bars claims that could have been litigated during the state court proceedings. Perhaps so,

[10] We have considered and find to be without merit the Johnsons' contentions regarding the rulings on discovery procedures and the denial of their motion to file a third amended complaint.

but in light of our holding that *Rooker-Feldman* deprived the district court of subject matter jurisdiction, we need not address this argument. Because *Rooker-Feldman* and *Williamson County* preclude federal review of the Johnsons' various takings claims, the determination regarding the precise reach of the state court judgment is a matter for the state courts to decide.

Conclusion

As modified to reflect our holding that the district court was without jurisdiction to consider certain of the Johnsons' claims, the judgment is affirmed.

STATE OF MINNESOTA **DISTRICT COURT**
FOURTH JUDICIAL
COUNTY OF HENNEPIN **DISTRICT**

Dated: JANUARY 05, 2000

NOTICE OF ENTRY OF JUDGMENT

GARY A VAN CLEVE
7900 XERXES AVENUE S
SUITE 1500
BLOOMINGTON MN 55431

IN RE:
CITY OF SHOREW00D

vs **File Number:** DC CD 000002344

JOHNSON, RONALD, R

You are hereby notified that on this date **JUDGMENT** was **ENTERED** in the above-entitled matter.

DATE OF JUDGMENT : JANUARY 05, 2000

Mark S. Thompson
Judicial District Administrator
Hennepin County Courts

CITY OF SHOREWOOD, petitioner, Appellant,
v.
Ronald R. JOHNSON, et al., Respondents,
and
FIRST BANK NATIONAL ASSOCIATION, Southdale office, Defendant.

No. C5-97-1525.
Court of Appeals of Minnesota.
April 21, 1998.

Hennepin County District Court File No. CD2344

Considered and decided by DAVIES, Presiding Judge, TOUSSAINT, Chief Judge, and KALITOWSKI, Judge.

UNPUBLISHED OPINION

DAVIES, Judge.

In this condemnation proceeding, appellant argues that the trial court erred by denying its motions for JNOV or a new trial. Respondents allege the court erred by denying their motion for contempt and by granting appellant's motion to exclude loss-of-access evidence. We affirm.

FACTS

In 1984, appellant City of Shorewood built a pond and control structure on city property. The control structure blocks a ditch that drains abutting property owned by respondents Ronald R. and Dee L. Johnson. Although the control structure is designed

to maintain the pond's water level at a 910-foot elevation, the pond regularly rises to a level of 914 feet, flooding a portion of respondents' property. In addition, there was temporary flooding to a higher level as a consequence of an inadequate road culvert.

In 1991, respondents sued appellant, alleging that the flooding constituted a compensable taking of their property. The trial court found there had been an irreversible physical taking of all property below 914 feet and ordered appellant to initiate condemnation proceedings. We affirmed that order. *Johnson v. City of Shorewood,* No. CX-93-2452 (Minn.App. May 17, 1994), *review denied* (Minn. July 15, 1994).

After condemnation commissioners awarded respondents $2,000 for the easement value of the land and $3,000 as a "cost-to-cure damage," respondents appealed to the district court. During that appeal, respondents moved to hold appellant in contempt, alleging that, because of a faulty legal description, appellant failed to condemn all property below the 914-foot elevation. The trial court denied the motion. The condemnation matter finally went to trial in 1996. Appellant brought a motion in limine, which the trial court granted, to exclude evidence that the taking deprived respondents of access to the northwest quadrant of their property.

The jury returned a special verdict awarding respondents (1) $2,000 for the easement, (2) $0 for the difference between the pre- and post-takings fair market value of their property, and (3) $63,000 for

clean-up damages. Finding that the first two awards were inconsistent, the court held that respondents were not entitled to any damages for the loss of value in their property and entered judgment for $63,000.

The city moved for JNOV or a new trial. The city appeals that denial of its motion, and respondents appeal the court's denial of their contempt motion and its grant of appellant's motion to exclude loss-of-access evidence.

DECISION

I.

Judgment notwithstanding the verdict (JNOV) shall be granted "if the moving party would have been entitled to a directed verdict at the close of the evidence." Minn.R.Civ. P. 50.02(a). The trial court's decision to deny a motion for JNOV will be affirmed unless "the evidence is practically conclusive against the verdict." *Seidl v. Trollhaugen, Inc.,* 305 Minn. 506, 507, 232 N.W.2d 236, 239 (1975).

Appellant characterizes the jury's award to respondents as "cost-to-cure" damages and argues that respondents are precluded from collecting such damages because the jury found no difference between the pre- and post-takings market value of respondents' property. *See Bulletin Publ'g Corp. v. City of Cottage Grove,* 379 N.W.2d 685, 687 (Minn.App.1986) (when cost of restoring property to natural condition is less than difference in pre- and post-takings value,

property owner is entitled to collect restoration costs and nothing more); *see also Alexandria Lake Area Serv. Region v. Johnson,* 295 N.W.2d 588, 590 (Minn.1980) (restoration damages awarded in certain cases to restore remaining property to usable condition).

In a partial takings case, the correct measure of damages is

> the difference between the fair market value of the entire piece of property immediately before the taking and the fair market value of the remainder of the property after the taking.

State by Humphrey v. Strom, 493 N.W.2d 554, 558 (Minn.1992).

> To determine the fair market value of property in a condemnation proceeding "[a]ny competent evidence may be considered, if it legitimately bears upon the market value."

County of Ramsey v. Miller, 316 N.W.2d 917, 919 (Minn.1982) (quoting *State v. Malecker,* 265 Minn. 1, 5, 120 N.W.2d 36, 38 (1963)).

Here, the court allowed the jury to consider clean-up costs because the cost of cleaning up damage from flooding "legitimately bears upon the market value" of respondents' property. Appellant argues that, because the jury found no diminution in the pre- and post-takings market value of respondents' property, respondents are precluded from collecting

clean-up damages. We disagree, for the jury's response to the third special verdict question was not necessarily predicated on its response to the prior questions. The jury may have found there was no diminution in market value from the taking only because respondents *prevented* a diminution in market value by restoring their property to its pre-flood condition, incurring significant costs in doing so. If respondents had *not* cleaned up the damage, the property's fair market value would have been diminished because potential buyers would have subtracted clean-up expenses from the price they would pay for the property. The trial court did not misinterpret the rule of damages and did not err in denying appellant's motion for JNOV.

II.

Appellant argues that the trial court, in denying its new trial motion, left uncorrected two errors of law. Where a court's new-trial decision is based on an error of law, a de novo standard of review applies. *Halla Nursery, Inc. v. Baumann-Furrie & Co.*, 454 N.W.2d 905, 910 (Minn.1990).

Appellant first claims the court erroneously admitted evidence of damages that occurred above the 914-foot elevation contour. But in a partial taking,

> [t]he owner is entitled to compensation *not only for the part taken but also for damage to the part not taken.* This is implicit in the rule

> given to jurors that they are to measure the damages by the difference in the market value of the entire tract before the taking and the market value of the tract remaining.

State by Lord v. North Star Concrete Co., Parcel Channel Change No. 26, 265 Minn. 483, 488, 122 N.W.2d 118, 122-23 (1963) (emphasis added). If flooding of respondents' property resulted in damage to trees, vegetation, or soil outside the flooded area, the jury was entitled to consider that damage in determining the amount of compensation to be paid. Here there was evidence of such damages.

Appellant also argues that the trial court should have instructed the jury on respondents' duty to mitigate damages. A trial court has broad discretion in determining jury instructions. *State Farm Fire & Cas. Co. v. Short,* 459 N.W.2d 111, 113 (Minn.1990). An appellate court will reverse only when a jury instruction is an abuse of discretion. *Alholm v. Wilt,* 394 N.W.2d 488, 490 (Minn.1986).

Although a property owner in a takings case "must exercise reasonable diligence to minimize his damages, the extent of the duty imposed by the rule depends on the facts of each case." *State by Lord v. Casey,* 263 Minn. 47, 54, 115 N.W.2d 749, 755 (1962). Here, Ronald Johnson testified that after the flooding occurred he spent more than 3,400 hours removing dead trees and debris and that his time was worth $20 per hour. The city presented testimony that the ditch

could more reasonably have been cleaned up with a bulldozer and reseeded at a cost of $4,500.

When reviewing a jury verdict, we "consider the evidence in a light most favorable to the verdict and sustain that verdict if possible, on any reasonable theory of evidence." *Dang v. St. Paul Ramsey Med. Ctr. Inc.*, 490 N.W.2d 653, 659 (Minn.App.1992), *review denied* (Minn. Dec. 15, 1992). The record supports respondents' claim that the fragile nature of their property precluded the use of heavy machinery to remove the dead trees and debris caused by the flooding. On this record, the jury could have found that respondents' valuation of the time and effort to clean up the property was reasonable and rejected appellant's claim that these costs were unreasonable. The trial court did not err in refusing to instruct the jury on mitigation of damages, for the issue was not mitigation. Rather, the issue was the reasonableness of the means chosen to restore the property.

It was not error to deny the new trial motion.

* * *

Affirmed.

STATE OF MINNESOTA **DISTRICT COURT**

COUNTY OF HENNEPIN **FOURTH JUDICIAL DISTRICT**

City of Shorewood,

Plaintiff,

vs.

Ronald R. Johnson and Dee L. Johnson,

Defendant.

Case No. CD2344

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR JUDGMENT

(Filed Oct. 23, 1996)

The above-entitled matter came on for a Jury Trial on the 14th day of October, 1996 before the undersigned, a Judge of the District Court, Hennepin County Government Center, Minneapolis, Minnesota.

Larry D. Martin, Esq. and Timothy J. Keane and Sharna A. Wahlgren, Esq. appeared for and on behalf of the Petitioner, the City of Shorewood and Daniel Shulman and David Shulman, Esq. appeared for and on behalf of the Respondents, Ronald R. Johnson and Dee L. Johnson.

The matter was submitted for consideration by the Jury on October 22, 1996. The Jury returned answers on a Special Verdict Form on October 23, 1996 and the Court adopted its verdict to make the following:

FINDINGS OF FACT

The Court adopts as facts, the following Findings of the Jury dated October 23, 1996:

1. What amount of money, if any, will compensate the Johnsons for the easement actually taken?

ANSWER: $2,000.00

2. What damages, if any, do you award the Johnsons as the difference between the fair market value of the entirety of their property before the City's taking and the fair market value of the remainder of their property after the City's taking?

ANSWER: $ -0-

3. What damages, if any, do you award the Johnsons as the reasonable cost of clean-up arising out of the City's taking of their property?

ANSWER: $63,000.00

CONCLUSIONS OF LAW

1. The Jury, finding that the difference between the fair market value of the entirety of the property before the City's taking and the fair market value of the remainder of the property after the City's taking was zero, the Respondents are not entitled to any damages for the loss of value in their property. However, the Jury found that the Respondents are

entitled to $63,000.00 as a reasonable cost of clean-up arising out of the City's taking of their property.

IT IS HEREBY ORDERED:

1. That the Respondents, Ronald R. Johnson and Dee L. Johnson are entitled to judgment against the Petitioner, the City of Shorewood, in the amount of $63,000.00 together with their costs and disbursements herein.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Judgment will be stayed for 30 days from the date hereof.

BY THE COURT

Dated: Oct. 24, 1996 /s/ Allen Oleisky
Allen Oleisky
Judge of District Court

EXHIBIT 8

STATE OF MINNESOTA	DISTRICT COURT
COUNTY OF HENNEPIN	FOURTH JUDICIAL DISTRICT

City of Shorewood,

Petitioner,

vs.

Ronald Johnson and Dee Johnson, et al.,

Respondents.

TRIAL TRANSCRIPT

VOLUME 10-22-96

D.C. File CD-2344

The above-entitled matter came duly on for hearing before the Honorable Allen Oleisky, Judge of the above-named Court, on the 22nd day of October, 1996, at Courtroom 1853, Hennepin County Government Center, Minneapolis, Minnesota.

– – –

APPEARANCES

LARRY D. MARTIN, ESQ., and TIMOTHY KEANE, ESQ., Attorneys at Law, appeared for and on behalf of the Petitioner;

DANIEL SHULMAN, ESQ., and DAVID SHULMAN, ESQ., Attorneys at Law, appeared for and on behalf of the Respondents; and

JEFFREY E. BUNDAY, Court Reporter.

[2] * * *

INDEX

Witness: Ronald P. Peterson

	Direct	Cross	Redirect	Recross
Mr. Martin	3		68,84	
Mr. Shulman		44		80

EXHIBITS

		mk'd	off'd	rec'd
Exh. 112	color-copy photo		3	3
Exh. 113	historic photo	5	5	6
Exh. 114	10-20 memorandum	18	18	18
Exh. 115	cover page	23	23	23
Exh. 116	cover, Fed. Regs.	26	27	27
Exh. 77	guidance letter	62	63	63
Exh. 117	three Corps letters	77	79	80

* * *

[20] especially as of the date of the taking December 31st, 1984.

A. OK. Until 1984, we did not have any of the wetland-delineation manuals that we have today. There are two manuals, one is the 1987 Corps of Engineers Wetland-Delineation Manual and the other is the 1989 Federal Manual for Identifying and Delineating Jurisdictional Wetlands.

At the current time, the '89 manual is not in use. The '87 manual is the one that is applied both by state and federal agencies under the law today. In 1984 –

Q. Let me stop you right there. You're going a little bit fast for me. In 1987, the Corps of Engineers prepared a manual?

A. That is correct.

Q. And this manual helps people like yourself to delineate wetlands?

A. It is the guidance that we – all wetland delineators have to go by in identifying and delineating wetlands today.

Q. That started in 1987?

A. That is correct.

Q. Now, you mentioned one in 1989. Who did that

* * *

[57] observed that this ditch had been excavated by Mr. Johnson so the profile is meaningless, the surface profile going down the ditch.

Q. Yeah. Now, you said you – you made an Affidavit saying that when you talk about Mr. Johnson excavating the ditch, you made an Affidavit, didn't you, saying that in your opinion Mr. Johnson would need a permit from the Corps of Engineers in order to do the work that he did in that ditch?

A. Based on three letters from the Corps, yes.

Q. Well, let me show you Exhibit 26 in evidence. Do you see that?

A. Yes, I do.

Q. Have you seen it before?

A. Yes, I have.

Q. And that says that Mr. Johnson, the work that Mr. Johnson was doing in his ditch was exempt. Right?

A. Mr. Johnson –

Q. Is that what it says?

A. Yes. Not the work that he did in 1995. If he were to do that work after the date of this exemption, it would have been exempt.

Q. Yeah. OK. So –

[58] A. He did work and then applied for the exemption.

Q. And he got the exemption. Right?

A. Yes.

Q. So he didn't need a permit, did he, to do the work you said he needed to do?

A. He needed to get confirmation from the Corps that he didn't need a permit.

Q. He got that confirmation?

A. He got – He got confirmation that he has an exemption for ditch maintenance.

Q. You said he needed a permit, right –

A. Yes.

Q. – in your sworn Affidavit?

A. Based on what the Corps said and based on what I thought.

Q. And you were wrong, weren't you?

A. I think he needed a permit for what he did because I think I saw evidence that he went beyond the original profile of the ditch.

Q. The Corps gave him an exemption. Right?

A. Yes, they did.

Q. They said he didn't need a permit?

A. That's for the ditch maintenance.

Q. You said he did?

[59] A. Yes – and I still think he needed one.

Q. So you think the Corps was wrong?

A. Yeah, I do. I don't think they visited the site.

Q. Now, in your report do you have any drawings like this, ditch-profile drawings?

A. No, sir, I don't.

Q. OK. Now, as I understand your testimony, you think that – you will agree that if the Johnson property was not – was not a wetland before the taking and is now a wetland, you would agree that the Johnsons have sustained damage, would you not?

A. Yes.

Q. OK. We'll write damage (indicating) pre-taking, wetland – Oh, no. Wetland and after wetland. Under those circumstances, you would agree that Mr. Johnson – that the Johnsons have sustained damage. Correct?

A. Correct.

MR. SHULMAN: I'll move the easel.

BY MR. SHULMAN:

Q. Now, it is a fact, is it not, that so far as you're concerned whether – as far as you are

* * *

[65] which in the past have been transformed into dry land for various purposes." Do you see that?

A. Yes, I do.

Q. OK. Now, that means, does it not, that if an area was once a wetland and because, for example, of drainage is no longer a wetland, the Corps does not intend to assert jurisdiction over it?

A. I don't think that's exactly what it says. What it says is that if it's converted to dry land, that they would not exercise jurisdiction over it.

Q. That means, does it not, that if the ditch on the Johnsons' property had drained their property so that the property no longer possessed the features of a wetland, the Corps of Engineers would not assert – would not have asserted jurisdiction over it as a wetland, isn't that true?

A. Such that it would not have a predominance of hydrophytic vegetation, yes, that would be true.

Q. You're aware that the Corps of Engineers has not asserted jurisdiction over this property, [66] are you not?

A. They most certainly have.

Q. Now, you – And this (indicating) is a regulation that you didn't look at in your work. Right?

A. I have not looked at this regulatory guidance letter, no.

Q. You didn't even know about it before today, did you?

A. The Corps doesn't keep it on their – on their list. It's so old and expired – expired the date of the taking.

Q. You didn't know about it before today. Right?

A. No. I've seen more recent versions of it. I didn't know about this old one, though, but it doesn't change my conclusion.

Q. Now, you gave some testimony about what you think – how you think the City would apply its zoning – I'm sorry, its wetlands ordinance. Do you remember that testimony?

A. No. I remember testifying as to what the plain language of the ordinance says.

Q. Oh, you didn't give any views about how the City would apply it?

A. I don't recall. I don't think so.

[67] Q. Now, you were here in court for part of the testimony of Mr. Nielsen. Correct?

A. Yes.

Q. OK. Do you remember Mr. Nielsen saying that if somebody as qualified, for example, as Mr. Frank had come in with a six – with a 6-lot proposal and had demonstrated that this – that the area involved was not wetland, then it's possible that Mr. Nielsen would have approved it? Do you remember that testimony?

A. Yes.

Q. And were you also here when Mr. Nielsen testified that the only reason any portion of the Johnsons' property appears as a designated wetland as is a result of the City ordinance?

A. I don't know that I recall that, no.

Q. Were you here when he testified that if someone were to dispute that the property was in fact a wetland, that he would look to the DNR and Corps of Engineers for a determination of whether it really was a wetland?

A. I think I recall that testimony, yes.

Q. And I think you said that if somebody's property is designated as a wetland under the ordinance and the person wishes to build on the [68] property, one of the things that the person can do is to ask for a variance?

A. That's correct.

Q. And a variance is permission to do something that's different from what's in the ordinance but it's granted under the ordinance. Right?

A. Correct.

MR. SHULMAN: I have no further questions. Thank you.

THE COURT: Any redirect, Mr. Martin?

MR. MARTIN: Yes, Your Honor.

REDIRECT EXAMINATION

BY MR. MARTIN:

Q. Mr. Peterson, when you were asked about this document – Let me first ask you. You were asked

whether or not – Mr. Shulman said that the Corps has not exerted jurisdiction over this property. Has the Corps extended its jurisdiction over the lowland of Mr. Johnson's property?

A. Without question.

Q. How do you know that is true?

A. Because if the Corps – if someone applies for a permit or asks for an exemption for an [69] activity in a wetland that – or an area that the Corps determines it doesn't have jurisdiction over, it issues a no-jurisdiction letter, it does not issue an exemption or does not issue a permit.

By virtue of the fact that they required a permit for some of the activities Mr. Johnson proposed and that they issued an exemption letter for the ditch maintenance, they are in doing so indicating without question that they exercise jurisdiction over the wetland and if he comes in to do other activities in that wetland, they will be requiring permits.

Q. So without question that is a Corps of Engineers wetland?

A. Without question.

Q. And with respect to this language that Mr. Shulman has referred to in this letter, what do we call this letter – a regulatory letter?

A. Regulatory guidance letter.

Q. Is there anything in this letter, especially the language that he asked you to focus on, that changes the policy that you talked about earlier that was in effect until 1987 that required that only one of the three

* * *

[77] needed a – what – at least at that time they thought an individual Section 404 permit to do the ditch cleanout that he was proposing to do.

Q. Those letters indicated that the property was a wetland?

A. Yes, they do.

MR. MARTIN: I've got three letters I want collectively marked as one exhibit.

(Exhibit 117 marked for identification.)

BY MR. MARTIN:

Q. Mr. Peterson, I'm handing you what's been marked as Exhibit 117. Are those the letters that you reviewed in your research from the Corps of Engineers?

A. That is correct.

Q. And what language in those letters specifically leads you to believe that the Corps believed the Johnsons' property was a wetland?

A. Well, there are three letters. One is February 7th, 1994, one is from March 2nd, 1993, one is from

March 17th, 1993. So two in March of '93 and one a year later.

March 2nd, 1993 letter indicates – well, it indicates that we believe you may need an [78] individual permit of the army, Section 404 permit for the ditch cleanout work that he was proposing. It also references at some length the agricultural ditch-maintenance exemption and describes what has to be shown to get it and also it spells out explicitly the recapture provision. I can read that if you like.

Q. No. Why don't you move on to the next letter.

A. The March 17th, 1993 letter says: "As stated in our March 2nd, 1993 letter, we reviewed the information you provided about the ditch cleanout and requested removal about an existing culvert and control structure. With the information we have, we still believe you may need an individual department of the army Section 404 permit for cleanout. The proposed project appears to involve a discharge of excavated material and grading of existing spoil banks in wetland and it may affect a substantial area of wetland."

Then it goes on again to explain that some agricultural ditch maintenance work can qualify for an exemption for a permit though there are strict guidelines that apply, and it again indicates that the affected wetland must not be [79] converted to new uses.

Q. Then the last letter?

A. The February 7th, 1994 letter says that: "As stated in our March 2nd and March 17th, 1993 letters, we still believe that you need an individual department of the army Section 404 permit for clean-out of the ditch. The proposed project appears to involve an excavation in a ditch through a wetland and possibly grading of existing spoil banks in wetland and it may affect a substantial area of wetland.

According to the National Wetland Inventory map and other sources, the effected area appears to have been a wetland before the dam and road construction" –

Q. Could you read a little bit louder?

A. Sure. "According to the National Wetland Inventory map and other sources, the effected area appears to have been a wetland before the dam and road construction in the mid 1980s and it appears to remain a wetland today."

Q. That's the Army Corps of Engineers writing?

A. That is correct.

MR. MARTIN: Your Honor, I'd offer Exhibit 117.

[80] MR. SHULMAN: No objection, Your Honor.

THE COURT: It will be received.

MR. MARTIN: That's all I have, Your Honor.

RECROSS-EXAMINATION

BY MR. SHULMAN:

Q. May it please the Court, those letters that you refer to, those are all after 1984, aren't they?

A. Yes, they are.

Q. And they're – At that time, they're all at the time of when the pond-control structure had dammed the ditch. Right?

A. The letters were drafted, yes, after that – after the pond was constructed, yes.

Q. Right. That pond – So at that time, that taking made that property a wetland, didn't it?

A. No.

Q. You – After you got – you saw those letters, that's when you filed your Affidavit with the Court. Right?

A. I'm sorry. Could you run that by me again?

Q. You saw those letters and then –and you read them to say that Mr. Johnson would need a [81] permit, right, to clean out his ditch?

A. I think that's a fair interpretation of the letters, yes.

Q. So what you did was you tattled on Mr. Johnson to the Court. Right? You submitted an Affidavit saying in your opinion based on the letters he'd need a permit?

A. I would –

MR. MARTIN: Objection, Your Honor, relevance.

THE COURT: Sustained.

BY MR. SHULMAN:

Q. Based on those letters, you told the Court, did you not, you said: "Based upon my experience with the regulations of the U.S. Army Corps of Engineers, the Wetland Conservation Act and the Riley/Purgatory/Bluff Creek Watershed District, permit would be required under such regulatory program for ditch maintenance and alteration activities to be carried out on the subject property." That's what you said. Right?

A. That's correct.

Q. And you also told the Court that you believed that Mr. Johnson was doing work without permits?

[82] A. I know him to be.

Q. And you told that to the Court. Right?

A. Yes.

Q. OK. And your opinion that he needed a permit was wrong, wasn't it?

A. He needed an exemption. He needed some indication that he didn't need a permit.

Q. Your statement to the Court that he needed a permit was wrong, isn't that true?

A. No, it wasn't wrong.

Q. He didn't get a permit, did he?

A. He got an exemption.

Q. Right, he got an exemption. Now, you also said that in the area of the six lots there were no trees as shown on the map that was done in Mr. Bopray's report. Do you remember that testimony?

A. Yes, I do.

Q. Just so we're clear on where the six lots are, that's this are (indicating). Right?

A. That's my understanding, yes.

Q. There are trees here, aren't they, shown on Mr. Bopray's work?

A. There were some shown along the ditch, yes. I'm sure there's trees in other areas, too.

[83] Q. Right. There is – For example, 211, we find that right here (indicating). Right?

A. Yes.

Q. And that's a – that's a sumac, an upland tree. Right?

A. Yes.

Q. So that's shown in the area of the six lots, isn't it?

A. Yes.

Q. You were wrong about that, weren't you?

A. All I said was there didn't appear to be a lot of trees or any trees shown in the area of the six lots.

Q. There are trees there, aren't there?

A. Oh yeah. I'm sure there are other trees all the way down there.

Q. Now, it's also, I think your testimony, that all of the area that's shown here within wetland boundaries was, is, and always will be wetland?

A. That's not what I said.

Q. Is it your testimony that all of this area was and is wetland?

A. Yes.

Q. Do you know there's been development in here?

* * *

STATE OF MINNESOTA — DISTRICT COURT

COUNTY OF HENNEPIN — FOURTH JUDICIAL DISTRICT

Court File No. 91-18099

Ronald R. Johnson and
Dee L. Johnson,

Plaintiffs/Petitioners,

vs.

City of Shorewood and the Shorewood City Council, said Council consisting of Mayor Barbara J. Brancel, and Councilpersons Rob Daugherty, Daniel Lewis, Kristi Stover and Robert Gagne,

Defendants/Respondents.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR JUDGMENT

The above-entitled matter came on for court trial before the Honorable Ann Montgomery, Judge of the above-named Court, on June 22, 1993. John F. Bonner III, Esq., appeared on behalf of the Johnsons. Thomas B. Humphrey, Esq., appeared on behalf of the City of Shorewood and the Shorewood City Council (hereinafter collectively the "City"). Post-trial submissions were received by the Court on July 21 and 28, 1993.

Based upon all the arguments, files, records and proceedings herein, including the stipulated submissions of the parties, the Court makes the following:

FINDINGS OF FACT

1. The Johnsons purchased the parcel of land in question (the "property"), located within the City of Shorewood, in 1981. The property consists of approximately 11 acres of knolls and 9 acres of low, flat land.

2. At the time the Johnsons purchased the property, the land in the low area of the property was composed of marsh-type soils which are unsuitable for development.

3. Prior to the time that the Johnsons purchased the property, the City had designated the low area as wetland. The parties dispute the legality of this designation.

4. A drainage ditch runs diagonally through the low area from the northeastern corner to the southwestern corner of the property. After it exits the property, it continues through a subdivision called Waterford, which lies to the south of the property, and ultimately joins Purgatory Creek. The elevation of the bottom of the ditch where it exits the property at the southwest corner is 902 feet.

5. In 1975, prior to the Johnsons' ownership, a Comprehensive Storm Water Study conducted by the City proposed that the low area of the property be used as a storm water drainage basin for storm sewer runoff from north of the property. The study did not propose that a pond or dam be built in the drainage ditch.

6. At the time the Johnson purchased the property, there was no pond on the property and water flowed freely through the ditch.

7. In 1984, in conjunction with the construction of the Waterford development to the south and west of the property, the City constructed a control pond in the ditch on City property abutting the south boundary of the property.

8. The purpose of the pond was twofold: (1) to provide an aesthetic feature, and (2) to serve as a collection point for storm water runoff from Waterford so that the water could be directed into the drainage ditch. Ponding of storm sewer runoff allows sediment to settle out of the water, which prevents pollution downstream, and allows the rate of water flow downstream to be controlled to prevent erosion of the water channel.

9. Storm drainage facilities were designed and constructed to direct strom water directly into the pond from three directions: (1) from Muirfield Circle to the northwest, (2) from Waterford Place east of the pond, and (3) from Waterford Place west of the pond. In addition, water flows into the pond through the drainage ditch from the northeast.

10. In conjunction with creating the pond, the City constructed a pond control structure to maintain a minimum level of water in the pond and to control the rate of water flow into the ditch below the pond.

11. Calculations of storm water levels and the design for the pond control structure were submitted by the City to the Riley Purgatory Creek Watershed District which subsequently granted a permit for construction of the pond and pond control structure.

12. Based on the design of the pond control structure and the topography surrounding the pond area, the Watershed District designated a 100-year storm event flood plain at an elevation of 917.1 feet.

13. The 100-year storm event is an engineering design mandate which plans for a rainfall that statistically appears on average once every 100 years. This level must be taken into consideration when designing water-control structures.

14. The Watershed District permit prohibits construction at elevations lower than 919.1 feet, two feet above the 100-year flood plain.

15. Upon receipt of the permit, the pond control structure was installed in accordance with the specifications approved by the Watershed District.

16. As constructed, the pond control structure has three openings through which water can enter the structure from the pond: (1) a six-inch diameter side inlet at the 910-foot elevation, (2) a twelve-inch diameter side inlet at the 911.5-foot elevation, and (3) a thirty-six-inch drop inlet at the 914-foot elevation. Water that enters the structure flows into a culvert and then flows into the preexisting drainage ditch south of the pond.

17. The pond control structure is designed to maintain a normal water level in the pond at an elevation of 910 feet. At that elevation, the pond backups up onto the Johnsons' property.

18. Water levels typically exceed the 910-foot elevation and have been observed at an elevation of 911.5 feet during fair weather.

19. Two to three times per year, during major storm events, water in the pond has risen above 914 feet and poured through the top of the pond control structure.

20. As the elevation of water in the pond rises, more water backs up onto the property.

21. The pond and pond control structure do not provide any benefit to the Johnsons' property.

22. The pond control structure was designed and constructed to be permanent, but is capable of being removed or altered.

CONCLUSIONS OF LAW

1. There has been a physical taking of the Johnsons' property up to an elevation of 914 feet since December 31, 1984. The Johnsons' property is expected to flood to this level with sufficient frequency to constitute a permanent physical invasion.

2. Neither the designation of a 100-year flood plain at 917.1 feet, nor the restriction on building below 919.1 feet constitute a taking of the Johnsons'

property. There is no permanent physical invasion or appropriation of the Johnsons' property at these elevations.

3. Further, the restrictions on construction do not constitute a regulatory taking because they do not detrimentally affect the potential uses of the Johnsons' property.

4. Although the pond control structure is "removable," it was constructed as a permanent fixture. Thus, even if the City removes the structure and eliminates the resultant flooding of the Johnsons' property in the future, under *First English Evangelical Lutheran Church v. County of Los Angeles,* 482 U.S. 304 (1987), the physical invasion of the Johnsons' property during the period in which the pond control structure was operational is an irreversible taking which requires compensation.

5. Because the physical taking of the Johnsons' property to elevation 914 feet is irreversible, there is no adequate remedy other than an order of mandamus compelling commencement of inverse condemnation proceedings.

6. The Johnsons have successfully brought an action compelling the initiation of inverse condemnation proceedings and are, therefore, entitled to an award of reasonable attorney fees and costs under Minn. Stat. § 117.045.

ORDER FOR JUDGMENT

1. The City of Shorewood shall immediately commence condemnation proceedings for the purpose of compensating the Johnsons for all damages which arise out of, and reasonably relate to, the taking by the city of the Johnsons' property.

2. The City shall pay to the Johnsons the amount of $33,878.64 as reimbursement for reasonable attorney fees, costs and expenses incurred in bringing this action.

NOTWITHSTANDING GEN. R. PRAC. 125, LET JUDGMENT BE ENTERED IMMEDIATELY.

BY THE COURT:

/s/ Ann Montgomery
Ann D. Montgomery
Judge of District Court

Dated: this 17th day
of August, 1993

MEMORANDUM

Ronald and Dee Johnson petition for a writ of mandamus compelling the City to commence eminent domain proceedings to compensate them for the taking of a portion of their property by flooding due too the construction of the pond and pond control structure. The United States Constitution provides that "private property [shall not] be taken for public use without just compensation." U.S. Const. amend. V. The Minnesota Constitution requires compensation when private property is "taken, destroyed or damaged for public use." Minn. Const. art. I, § 13. The legal standards for determining whether a taking has occurred were discussed at length in an earlier Order in this matter and that discussion is incorporated into this Memorandum. (Order of May 27, 1993.)

The City concedes that there has been water ponded on the Johnsons' property continuously at an elevation of 910 feet since December 31, 1984 and that these circumstances constitute a physical taking to that elevation. The City argues, however, that increases in the water level above 910 feet are only occasional and do not constitute a taking of the property to those higher elevations. "Whether occasional flooding is of such frequency, regularity, and permanency as to constitute a *taking* and not merely a temporary invasion for which the landowner should be left only to a possible recovery of damages is a question of degree, and each case must stand on its own peculiar facts." *Nelson v. Wilson,* 239 Minn. 164, 172, 58 N.W.2d 330, 335 (1953) (emphasis in original);

see also Spaeth v. City of Plymouth, 344 N.W.2d 815, 822 (Minn. 1984).

Although the pond control structure was designed to maintain a "normal" water level at 910 feet, the water level in the pond is routinely higher than 910 feet. Two to three times each year, high volume runoffs from major storms have increased the water level to at least the 914-foot elevation and it is reasonable to infer that the water level regularly rises to between 910 and 914 feet during storms of low to moderate severity. When storm runoff causes water in the pond to rise to the 914-foot opening of the pond control structure, the water will be swiftly drained away through the large, thirty-six-inch opening at the top of the structure. Thus, the likelihood that water will rise above that level for any significant period of time is slight and should occur infrequently, if at all, in any particular year.

Nevertheless, the Johnsons argue for a ruling that a physical taking of the property has occurred up to the 919.1-foot elevation, the level below which development is restricted based on the 100-year flood event. The Johnsons argue that these restrictions are akin to a physical taking because they are based on the "statistically anticipated" and "inevitable" invasion of water every 100 years. They also argue that the designation of the low area of the property as a flood plain and as part of the City's storm water drainage system is an "appropriation" of that property.

With respect to the Johnsons' first argument, inevitability is not the only criteria which must be met under the *Nelson* test for a physical taking by flood; rather, flooding must be sufficiently frequent, regular and permanent. 239 Minn. at 172, 58 N.W.2d at 335. While the *Nelson* decision states that this test must be applied on a case-by-case basis, *id.*, it is difficult to conceive of any case in which short-term flooding once every 100 years or so would be considered a permanent physical invasion.

The Johnsons' second argument is based on similarities between their claims and those in *Spaeth v. City of Plymouth,* 344 N.W.2d 815 (Minn. 1984). In *Spaeth,* the City of Plymouth developed a Storm Water Drainage Plan which designated the low area of the plaintiff's land as a ponding area. *Id.* at 817. When property abutting the plaintiff's lot was developed, a dam was built in a drainage ditch in order to create a pond in accordance with the City's drainage plan. *Id.* at 818. By the time of the trial, a large portion of the plaintiff's property had remained flooded by the pond for three years and the flooding was expected to continue. *Id.* at 822. The court held that a portion of the plaintiff's property had been taken and that eminent domain proceedings must be commenced. *Id.*

The Johnsons' argument suggests that the *Spaeth* court held that the entire portion of the plaintiff's property that had been designated either as "the ponding area" or as a "flood plain" had been taken, whether or not it had actually experienced

flooding at the time of the decision. The *Spaeth* decision is not clear on *what* portion of the plaintiff's property was taken. The references to the City's drainage plan were made with respect to the issues of permanency and the City's responsibility for the flooding, rather than to the geographical extent of the taking. *See id.* at 820-22. The essential factor supporting the decision that a taking had occurred in *Spaeth* was the occurrence of continuous flooding. *Id.* at 822. The reasoning in *Spaeth* does not compel a conclusion that mere designation of an area as being subject to flooding is sufficient to constitute a physical taking of property without a finding of actual or probable flooding on a frequent basis.

While it is possible that a flood plain designation and the associated restrictions on development could result in a regulatory taking, the Johnsons do not contend that the restrictions on development below 919.1 feet constitute a regulatory taking of their property.

Application of the *Nelson* test to the facts of this case supports a conclusion that flooding on the Johnsons' property from the backup of pond water has occurred, and will continue to occur so long as the pond control structure is in place, with sufficient frequency and regularity at levels up to 914 feet in elevation to constitute a physical taking of the property to 914 feet.

Generally, if a taking has occurred, the proper remedy is a writ of mandamus to institute inverse

condemnation proceedings to determine the amount of compensation to be made. *Haeussler v. Braun,* 314 N.W.2d 4, 9 (Minn. 1981). Mandamus shall not issue, however, if the taking or damage is not irreversible and where there is an adequate remedy at law, such as an injunction against enforcement of a regulation or ordinance. *McShane v. City of Fairbault,* 292 N.W.2d 253, 259 (Minn. 1980). The *McShane* court commented that mandamus would interfere with the municipality's discretion to either repeal the regulation that had been found to be a taking or to institute eminent domain proceedings. *Id.*

The City argues that mandamus is similarly inappropriate in this case and that the Court should issue an injunction requiring the City to remove or alter the pond control structure to allow for the free flow of water through the drainage ditch. This proposal does not protect the city's legislative discretion; rather, it makes the choice for them by requiring the City to take affirmative action to change the status quo. This result is quite different than the outcome in *McShane* where the municipality was enjoined from taking *further* action (enforcing a regulation) until it had decided whether or not to pursue eminent domain proceedings. Defendants argue that they may, in fact, decide to pursue condemnation proceedings instead. An order giving them a choice of complying either with an injunction or a writ of mandamus is inappropriate; such an order could delay prompt relief for the Johnsons.

Further, an injunction is simply not an adequate remedy in this case. The physical taking of the property that has already occurred by continuous flooding at the 910-foot elevation is not "reversible." In *McShane,* the taking that was enjoined was a regulatory taking; the City of Fairbault had imposed development and use restrictions on land below the flight path to the city airport. *Id.* at 255. The qualitative difference between physical and regulatory takings has been recognized by the U.S. Supreme Court which has held that physical invasions are per se takings, while regulations are not takings unless the impact of the regulation on property rights is not justified by the public interests to be served. *Agins v. City of Tiburon,* 447 U.S. 255, 260-61 (1980); *Lucas v. South Carolina Coastal Council,* ___ U.S. ___, 112 S. Ct. 2886, 2893 (1992). Unlike a regulation, once a physical invasion like a flood occurs it is irreversible, even though it may end.

The City may still choose to remove the pond and pond control structure and eliminate the continued taking of the Johnsons' property. This action would be a factor for the condemnation commissioners to consider in determining the amount of damages to be paid to the Johnsons.

Because mandamus will issue in this case, the Johnsons are entitled to an award of attorneys' fees and costs under Minn. Stat. § 117.045 which provides for such reimbursement when a plaintiff successfully brings an action compelling eminent domain proceedings. They are not entitled to full reimbursement,

however, because a substantial portion of this case involved claims which were resolved against the Johnsons by summary judgment. *See Spaeth,* 344 N.W.2d at 823.

Counsel for Plaintiffs has requested reimbursement of $43,487.23 for costs and expenses incurred in bringing this action, including attorney and expert fees. (Bonner Aff. dated July 21, 1993 and Bonner Aff. dated August 6, 1993.) A review of the invoices submitted in support of this request reveals that the total amount of attorneys' fees requested by Plaintiffs does not include amounts that have already been paid to Plaintiffs' counsel. (Bonner Aff. dated July 21, 1993, Ex. 1: $62.75 paid 12/31/91, $131.25 paid 2/28/92, $11,497.80 paid 10/29/92, and $120.54 paid 11/30/92.) It appears that this was an error in calculation and that the actual total costs and expenses incurred by Plaintiffs in bringing this action should be $55,299.57.

Plaintiffs were charged $19,832.17 for attorneys' fees and costs for the month of June 1993 and $3336 for expert witness fees for that same period. (Bonner Aff. dated July 21, 1993 and Bonner Aff. dated August 6, 1993.) Those costs and expenses were incurred after the summary judgment order was issued in this action. They were generated almost completely with respect to litigating the physical taking claim for which condemnation proceedings will be compelled and they should be fully reimbursed. In addition, it is appropriate for the City to reimburse the Johnson for one third of the remaining $32,131.40 in fees and

expenses incurred prior to the summary judgment motion. Plaintiffs shall be awarded $33,878.64 for reimbursement of reasonable fees and costs incurred in obtaining a writ of mandamus compelling condemnation proceedings.

ADM